IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1996 OF 2007

IN

SUIT NO.1449 OF 2007

Parmeshwari Devi Ruia ...Plaintiff

Versus

Krishnakumar Nathmal Murarka & Ors. ...Defendants

WITH

CHAMBER SUMMONS NO. OF 2007

IN

SUIT NO. 1449 OF 2007

Parmeshwari Devi Ruia. ..Plaintiff.

V/s.

Krishnakumar Nathmal Murarka & Ors. ..Defendants.

And

Surendra K. Shah. ..Applicant/ Intervenor.

Mr.D.J.Khambatta, Sr.Counsel with Mr.Gautam Ankhad with Mr.Arun Siwach & Mr.B.R.Palav i/b Amarchand & Mangaldas & Suresh A.Shroff & Co. for Plaintiff.

Mr.R.A.Shah with Ms.Daksha Dadewal i/b Mansukhlal & Hiralal for Defendant No.1.

Dr.Virendra Tulzapurkar, Sr.Counsel with Ms.Alpana Ghone & Mr.Ravi Gandhi i/b Kanga & Co. for Defendants 2 & 3.

Mr.Milind Vasudeo with Mr.Prashant Beri i/b Beri & Co. for Defendant No.21.

Mr.A.S.Chandurwala with Mr.N.S.Rodrigues i/b Desai & Diwanji for Defendants 22 to 26.

Mr.Arif Bookwala, Sr.Counsel with Mr.Jariwale & Mr.Hetal Thakore i/b Thakore Jariwale & Associates for Applicants/Intervenors.

.....

CORAM : A.M.KHANWILKAR, J.

AUGUST 6, 2007.

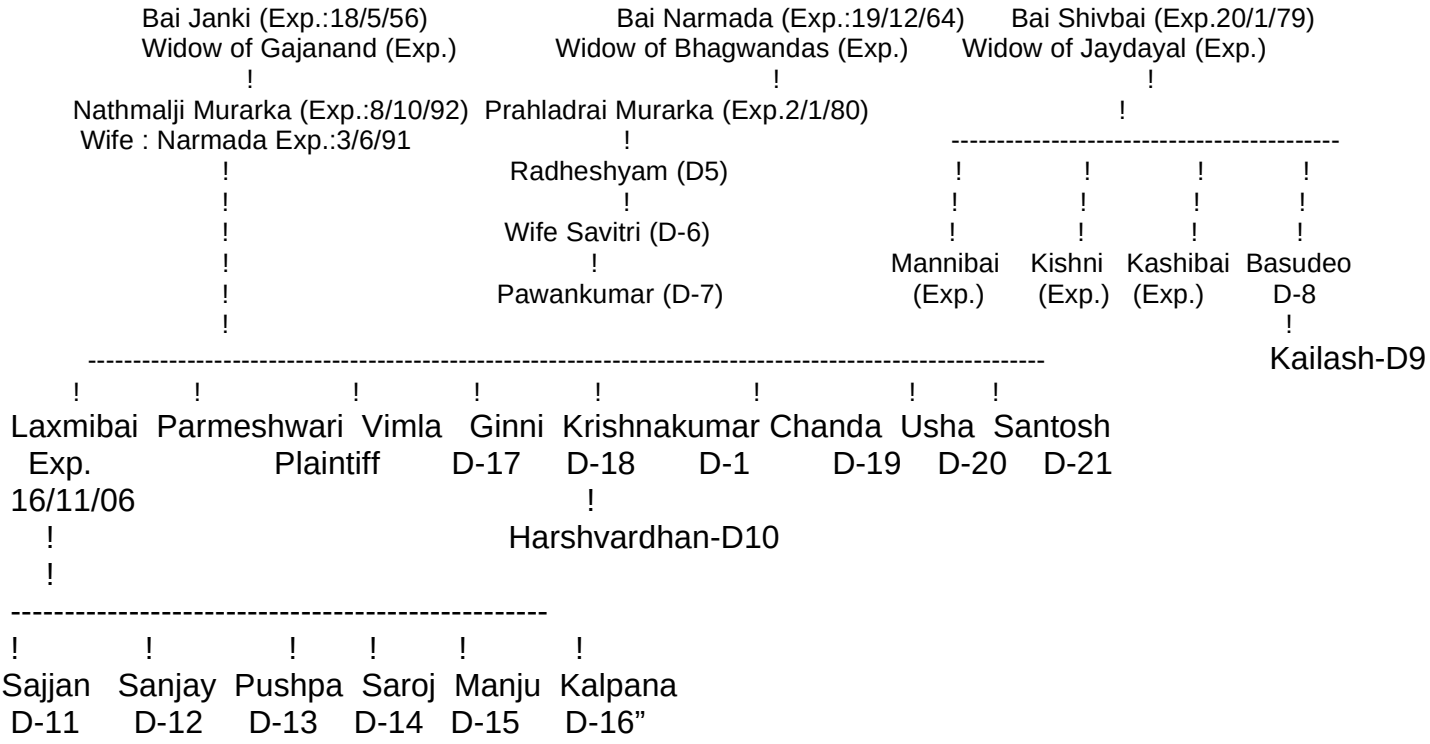
ORAL ORDER :

1. By consent, the Notice of Motion was heard for final disposal. Accordingly, this order will dispose of the Notice of Motion finally.

2. The Plaintiff has relied on the family tree of Murarka Family at Exhibit `A', correctness whereof was not in dispute. The same reads thus:

"EX-"A"

MURARKA FAMILY TREE



3. The Plaintiff, Defendant No.1 and Defendant Nos.10 to 21 are the heirs and legal representatives of Nathmal Murarka. The said

Nathmal Murarka expired on 8th October 1992. The said Nathmal had one son(Defendant No.1) and seven daughters(Laxmibai, Plaintiff and Defendant Nos. 17 to 21). At the relevant time, all were married.

4. According to the Plaintiff, Nathmal inherited property from his mother Jankibai. The said Jankibai had two sister-in-laws - Narmadabai B.Gangabhishen and Shivbai J.Ghasiram. By a Deed of Conveyance dated 21st November 1947, certain land with structures standing thereon earlier called `Krisna Kunj' at 24, Nepean Sea Road, Mumbai bearing Cadastral Survey No.1/590 of the Malabar and Cumballa Hill Division was transferred by one Shivprasad Vaid in favour of the said Jankibai, Narmadabai B.Gangabhishen and Shivbai J.Ghasiram in equal shares for a consideration of Rs.1,00,218.12/- (Rupees One Lakh Two Hundred Eighteen & Paise Twelve Only). According to the Plaintiff, the said Jankibai, through whom the Plaintiff claims right in respect of the said property, was 1/3rd owner thereof by virtue of the Deed of Conveyance dated 21st November 1947.

5. The said Jankibai, however, died intestate on 18th May 1956, leaving behind her only child Nathmal as her only heir and legal representative in respect of her estate, effects, properties and credits. According to the Plaintiff, the estate of Jankibai, including the suit property, devolved entirely and exclusively upon the said Nathmal. According to the Plaintiff, the said Nathmal also died intestate on 8th October 1992, leaving behind his son Defendant No.1 and seven married daughters i.e. The Plaintiff, Defendant Nos. 17 to 21 and late Smt.Laxmibai Ramgopal Modi (Defendant Nos.11 to 16 being her only heirs) as his heirs and legal representatives. According to the Plaintiff, the said Nathmal's estate included a haveli situated at Podar Gate, Navalgarh, District Jhunjhunjunu, Rajasthan, which also devoled entirely upon Plaintiff, Defendant No.1 and 17 to 21 and late Smit. Laxmibai Ramgopal Modi in equal shares.

6. For the purpose of present order for grant of interim relief during the pendency of the Suit, we are concerned only with above referred property at Nepean sea Road.

7. As aforesaid, besides Jankibai, there were other two co-owners having equal shares in the suit property being Narmadabai B.Gangabhishen and Shivbai J.Ghasiram. Defendant No.5 is the grandson of Narmadabai and is entitled to 1/3rd share in the suit property. Defendant No.6 is the wife of Defendant No.5, and Defendant No.7 is the son of Defendant Nos.5 and 6, who represent one branch of co-owners. Defendant No.8 is the son of Shivbai J.Ghasiram, and along with his three sisters, was entitled to 1/3rd share in the suit property being co-owners thereof. That Defendant Nos.11 to 16 are the legal heirs of late Smt.Laxmibai Ramgopal Modi (the elder sister of the Plaintiff), who expired on 16th November 2006. Defendant Nos. 17 to 21 are the younger sisters of the Plaintiff and granddaughters of Jankibai, who are also entitled to the estate of Jankibai.

8. It is the Plaintiff's case that the suit property is the ancestral house of the Plaintiff and Defendant Nos.1 and 5 to 21. The Plaintiff resided in the said property from 1947 until her marriage in 1954. Even after marriage, the Plaintiff continued to visit the other members

of the family who resided in the said property and also to keep, remove and check her cupboard and personal belongings lying at the ancestral home. It is stated that until recently upto 2004 the Plaintiff used to visit the ancestral home on Holi, Diwali and Raksha Bandhan to tie Rakhis on, inter alia, Defendant No.1. It is stated that the Plaintiff could not visit the ancestral house from 2005 due to her ill-health, old age and broken shoulder, which restricted her movements. It is stated that after the death of Plaintiff's father in 1992, the affairs of the said property in relation to 1/3rd Jankibai's estate including the payment of the municipal taxes and collection of rents from two tenants, namely Mr.Soli Irani and Mr.Kyal were under the control and management of Defendant Nos.5 and 8. It is stated that recently, in January 2007, the Plaintiff was shocked to see that her ancestral house on the suit property has been demolished. In that connection, Plaintiff made enquiries initially from the watchman on the said property, who, in turn, informed that the same has been demolished by Defendant No.3. Thereafter, on or about 18th January 2007, the Plaintiff called Defendant No.1 over telephone when Defendant No.1 informed that the bungalow has been sold. The Plaintiff made enquiries about the

papers and documents, but Defendant No.1 gave evasive replies to the Plaintiff. It is stated that the Plaintiff then caused search of the records in respect of the suit property with the Sub-Registrar of Assurances, Mumbai. During the search, the Plaintiff came across the Deed of Indemnity dated 20th January 2004 and the Deed of Conveyance dated 31st December 2005, which is executed to convey the suit property in favour of Defendant No.2. It is the Plaintiff's case that thereafter, Plaintiff attempted to get in touch with Defendant No.1, but it was of no avail. The Plaintiff then through her husband, tried to contact Defendant No.3, who directed the Plaintiff to call the Murarkas. It is stated that Defendant Nos.5 and 6 then informed the Plaintiff that Defendant No.1 was aware of the details of the entire transaction and asked her to speak to him. Defendant No.7 informed the Plaintiff to stay away and not get involved in the matter. The Defendant No.8 also did not part any information to the Plaintiff and instead asked her to contact Defendant No.1. The Plaintiff states that simultaneously, she exercised right under the Right to Information Act to obtain information and documents in relation to the said property by addressing letters dated 18th January 2007 to the Mumbai Municipal

Corporation. It is the Plaintiff's case that on receipt of the information, the Plaintiff, for the first time, learnt that Defendant No.1 had misled various authorities including this Hon'ble Court by filing false affidavits, collusive consent terms and by making representations that are ex facie false and erroneous. It is the Plaintiff's case that Defendant Nos.2 to 10 in collusion with Defendant No.1 and on the basis of misrepresentations, purported to illegally and fraudulently sell/dispose of the suit property including 1/3rd share of Jankibai's estate in the said property to Defendants 2 to 4.

9. The thrust of the Plaintiff's case is that the Defendant No.1 has intermeddled with and misappropriated the estate of the said Jankibai and of the said Nathmal by claiming that he was the sole representative and legal heir of the estate and properties of Jankibai so as to deprive the Plaintiff and other sisters of their share in the Jankibai's estate. The Plaintiff appears to have sent letters to the Assistant Municipal Commissioner as well as Municipal Commissioner and Senior Police Inspector of local Police Station highlighting the fact that Defendant No.1 was not the sole and absolute owner in relation to

Jankibai's estate and share in the suit property. The Plaintiff appears to have obtained documents under the provisions of the Right to Information Act even from this Hon'ble Court in February 2007 in relation to the proceedings in which Consent Terms came to be filed and Conveyance Deed was executed transferring right and interest in the suit property in favour of Defendants 2 to 4. In Paragraph 9 of the Plaint, the Plaintiff has set out all the relevant events in chronological order to assert that fraud has been perpetrated upon the Plaintiff and other heirs of the said Nathmal Murarka as also upon this Hon'ble Court. The assertion of fraud on this Hon'ble Court is in relation to the proceedings instituted by M/s.Vivek Enterprises (Defendant No.2 herein) in this Court being Suit No.1092 of 1981. The said Suit was filed for specific performance of an Agreement dated 26th December 1977 purportedly executed between Shivbai and Defendant No.2 herein, whereby, Shivbai offered to sell the suit property to Defendant No.2 for a total consideration of Rs.5,00,000/- (Rupees Five Lakhs) on behalf of herself and (a) Krishnakumar Nathmal Murarka (Defendant No.1), (b) Nathmal G.Murarka (father of Plaintiff, Defendants 1, 17 to 21 and late Smt.Laxmibai Ramgopal Modi), (c) Radheshyam

Prahladrai Murarka (Defendant No.5), (d) Pawankumar Radheshyam Murarka (Defendant No.7). In the said Suit, a Notice of Motion No.1108 of 1981, seeking interim relief of appointment of the Court Receiver and restraining the Defendants therein from alienating and disposing of the said property, was filed. The same was signed by one Mr.Rajendra Khemchand Kothari (Defendant No.22) in his capacity as partner of Defendant No.2. It is stated that the said Rajendra Khemchand Kothari is still a partner of Defendant No.2. The said Notice of Motion was eventually dismissed after contest, on 13th November 1981. At the same time, however, the Defendant No.2 (Plaintiff therein), was granted liberty to register Lis Pendens Notice in terms of order dated 13th November 1981. As per the liberty granted by this Court, Defendant No.2 registered Lis Pendens Notice, which was once again signed by Rajendra Khemchand Kothari in his capacity as partner of Defendant No.2. The late Mrs.Shivbai (who was alleged to have entered into the Agreement for Sale by herself and on behalf of the others) died intestate on 20th January 1979. She left behind Defendant No.8 herein and three married daughters. However, none of the heirs of Shivbai were brought on record or joined as

parties in Suit No.1092 of 1981. In the said Suit, a joint written statement was filed by all the five Defendants opposing the Suit inter alia stating – (a) no agreement had been entered into by the late Mrs.Shivbai; (b) there was no valid, binding or concluded agreement at any date between the parties and (c) the late Mrs.Shivbai could not have negotiated to sell entire property as she was only a co-owner and did not have authority to sell on behalf of the other co-owners.

10. Significantly, even Nathmal, predecessor of the Plaintiff and Defendant No.1 who was impleaded as Defendant No.2 in the said Suit died intestate on 8th October 1992, leaving behind the Plaintiff, Defendant Nos.1, 17 to 21 and late Smt.Laxmibai as his legal heirs and representatives. Out of legal heirs of Nathmal, only Defendant No.1 was already party to Suit No.1092 of 1981. None of the other heirs of Nathmal were brought on record in the said suit filed by Defendant No.2. It is the case of the Plaintiff that she was not aware of the said litigation. It is stated that on 7th January 1993, the Advocate for the Defendants therein furnished the names of heirs of Nathmal who had expired on 8th October 1992. Inspite of that, no steps were

taken to bring on record even the legal representatives of Nathmal (Defendant No.2 in that Suit). In other words, neither the heirs and legal representatives of Shivbai having 1/3rd share nor all the heirs and legal representatives of Nathmal (except Defendant No.1 who was already named as Defendant in the said Suit) were brought on record. It is also seen that on 7th June 2001, the Suit No.1092 of 1981 was dismissed on account of non appearance of the Plaintiff therein (Defendant No.2). As the Suit was dismissed, the Defendants in the said Suit applied to the Sub-Registrar for the deletion of the Lis Pendens Notice, which was accordingly dismissed on 14th August 2001. However, after the lapse of 3½ years, Notice of Motion No.3579 of 2004 was moved by the Plaintiff (Defendant No.2 herein) in that suit, praying- (a) to set-aside the order dated 7th June 2001 dismissing the suit and to restore the same on file; (b) for condonation of delay of three years and six months in filing the Notice of Motion; and (c) pending the hearing and final disposal of the Suit, the suit Defendants be restrained by an order of injunction from selling, disposing or encumbering the said property.

11. Even this Notice of Motion was signed by Rajendra Khemchand Kothari (Defendant No.22) in the capacity as partner of Defendant No.2. On 15th December 2004, an order, in terms of Consent Terms signed by the Advocates for the parties, was passed in the said Notice of Motion No.3579 of 2004 and the Notice of Motion was made absolute in terms of prayer clauses (a), (b) and (c). In terms of the said order, the Suit No.1092 of 1981 stood restored. However, the Defendant No.1 along with suit Defendants (i.e. Defendants 5 and 7 herein) filed Notice of Motion in that Suit being Notice of Motion No.44 of 2005, for setting aside the order dated 15th December 2004 passed in the earlier Notice of Motion No.3579 of 2004 and to restore the said Notice of Motion to the file to its original number for expeditious hearing. The said Motion was filed by the Defendant No.1 and Defendant Nos. 5 and 7 herein on the ground – (a) collusion between Advocates for Plaintiff and Defendant No.3; (b) M/s.Kapadia & Co. was representing only Defendant No.3 in the said Suit and none of the other Defendants and (c) that the signature on the Consent Terms in the said Suit did not appear to be of the Advocate for suit Defendant No.3 Mr.Shantilal Kapadia.

12. Significantly, Defendant No.1 herein filed reply to the said Notice of Motion asserting that upon the death of Nathmal, his heirs and legal representatives were not brought on record in the Suit No.1092 of 1981. Even so, the said Suit No.1092 of 1981 came to be finally disposed of in terms of the Consent Terms dated 25th February 2005 arrived at between Defendant No.1 and 5 to 8 on one hand and Defendant Nos.3 and 4 who represented to be the partners of Defendant No.2 on the other hand. According to the Plaintiff, neither of these Defendants (Defendant Nos. 3 and 4) were partners of Defendant No.2 at the relevant point of time. Moreover, Defendant Nos.8 and 6 herein, who were not even parties to Suit No.1092 of 1981, also signed the Consent Terms as Defendants 2 and 3 in the said Suit, even though they were not Defendant Nos.2 and 3 to the Suit No.1092 of 1981. As mentioned earlier, Defendant No.8 and his three sisters belong to branch of Shivbai, which branch was not made party to the original Suit. In terms of the Consent Terms, the Development Agreement dated 25th February 2005 was entered into between the suit Defendants (Defendant Nos.1, 5 and 7 herein) along

with Defendant Nos.6 and 7 as alleged owners of the suit property granting development rights therein in favour of Defendant Nos.3 and 4 as partners of Defendant No.2 for a consideration of Rs.4,75,000/- (Rupees Four Lakhs Seventy-five Thousand). Besides, an irrevocable Power of Attorney dated 25th February 2005 was also executed authorising Defendant Nos.3 and 4 and two sons of Defendant No.3 to carry out certain activities and exercise powers in relation to the development of the said property. It is the Plaintiff's case that to give legitimacy to the transaction, Defendants 1 to 8 abused the process of this Hon'ble Court and sought a collusive decree from this Hon'ble Court in terms of the Consent Terms vide order dated 3rd March 2005. It is the case of the Plaintiff that when the Notice of Motion No.44 of 2005 in Suit No.1092 of 1981 came up for hearing on 16th March 2005 before this Hon'ble Court, the parties to the Notice of Motion continued to prevaricate and did not disclose the status of Defendant Nos.6 to 8 in the Consent Decree dated 3rd March 2005. Instead, it was submitted that in view of the disposal of the Suit by Consent Decree dated 3rd march 2005, the Notice of Motion did not survive, for which reason, the Notice of Motion was disposed of on that date.

13. According to the Plaintiff, the Defendant Nos.1 and 5 to 8 also made false representations to the authorities under the Urban Land (Ceiling and Regulation) Act, 1976, while applying for permission under that Act by filing false affidavit of Defendant No.1 that he was the only legal heir to succeed the property left behind by Jankibai and Nathmal. Besides, material documents were suppressed by Defendant Nos.1 and 3 and reliance was placed only on the copy of the Property Registration Card, DP Records and Power of Attorney dated 25th February 2005 so as to cause misrepresentations to the authorities for obtaining ULC permission.

14. The Plaintiff asserts that the Defendants 1 to 8 continued their fraud on this Hon'ble Court by filing further Notice of Motion No.2796 of 2005 in Suit No.1092 of 1981 which was taken out by Defendant No.3 in the name of Defendant No.2 to bring on record modified Consent Terms dated 24th August 2005. As per the modified Consent Terms, the consideration amount in respect of the suit property was increased from Rs.4,75,000/- (Rupees Four Lakhs Seventy-five Thousand) to

Rs.18,59,00,000/- (Rupees Eighteen Crores Fifty-nine Lakhs). Once again, Defendant Nos.6 and 8 herein, who were not party Defendants in the aid Suit No.1092 of 1981 have signed the said Consent Terms. Once again, this Court was persuaded to pass order in terms of the modified Consent Terms on 17th October 2005 to decree the Suit in terms thereof. It is stated that presumably in terms of the modified Consent Terms dated 24th August 2005, a Deed of Conveyance dated 31st December 2005 was executed by Defendant No.1, 5 to 8 in favour of Defendant Nos.3 and 4 as partners of Defendant No.2. Later on, the Deed of Rectification dated 15th January 2006 was filed by the parties to the Deed of Conveyance dated 31st December 2005 as the Cadastral Survey Number of the plot was wrongly stated as 590 instead of 1/590.

15. The Plaintiff, therefore, sent legal notice on 24th January 2005 addressed to Defendants 1 to 4 calling upon them to issue public notice to the effect that Conveyance Deed dated 31st December 2005 allegedly executed in favour of Defendant No.2 and the Deed of Indemnity dated 20th January 2004 executed by Defendant No.1 were fraudulent documents and that the entire transaction was void ab-initio.

16. It is the Plaintiff's case that the Defendant, having realized that it did not have the ULC permission in March 2007, the Defendant No.3 in the name of Defendant No.2 applied for permission for re-development under Section 22 of the ULC Act. It is the Plaintiff's case that false statements have been made by Defendant No.3 in the Deed of Indemnity dated 8th Mach 2007 and in the affidavit in support of the said application dated 8th march 2007 submitted to ULC Authorities and on which basis, he succeeded in getting the ULC permission on 29th March 2007.

17. In Paragraph 12 of the Plaint, reference is made to the relevant clauses of the Deed of Indemnity dated 20th January 2004 being clause

Nos. (2) to (5). The Defendant No.1 made representation in the Deed of Indemnity that – (i) he is the only heir and legal representative in respect of the estates of the said Jankibai and the said Nathmal; (ii) his father the said Nathmal has not left any legal heir or representative in respect of his estate; and (iii) after the death of the said Jankibai, he was paying taxes etc. to the Government, Mumbai Municipal Corporation and other authorities. According to the Plaintiff, each of the statements are false to the knowledge of Defendant No.1. For, the said Nathmal died intestate, leaving behind one son (Defendant No.1) and seven daughters (Plaintiff, Defendants 17 to 21 and late Smt.Laxmibai). Significantly, the fact that Nathmal died leaving behind one son and seven daughters, is admitted by Defendant No.1 in the Development Agreement dated 25th February 2005 at recital 5(d) and clauses 6 and 7 thereof. This presupposes that the Defendants were fully aware that the heirs of Nathmal also had share in the property and estate of Jankibai. Moreover, at the time of death of Jankibai in 1956, Defendant No.1 was only 10 years old, for which reason, it was inconceivable that he would have paid taxes from 1956 onwards. The Defendant No.1, on such misrepresentations, fraudulently got the

name of Jankibai, which existed on the Property Card since 1947 deleted and got inserted his name into the Property Card, to the exclusion of the other heirs of the said Nathmal namely, the Plaintiff and Defendants 11 and 17 to 21.

18. In Paragraph 13 of the Plaint, the Plaintiff has adverted to the circumstances which establish the fact that representations made in the Deed of Indemnity dated 20th January 2004 and the Development Agreement dated 25th February 2005 are misleading, contradictory and ex facie false. The same was done with malafide intention of cheating and defrauding the Plaintiff and depriving her of her rights in the said Nathmal's estate (which includes the said Jankibai's 1/3rd share in the said property), which she is entitled to under the provisions of the Hindu Succession Act, 1956. At least six strong circumstances are adverted to in Paragraph 13 of the Plaint to allege that the said documents were fraudulent.

19. In Paragraph 14 of the Plaint, the Plaintiff has dealt with the circumstances which would spell out the fact that the Consent Terms

and Decree dated 3rd March 2005 was nullity, non est, collusive and obtained by perpetrating fraud on this Hon'ble Court and the Plaintiff.

20. In Paragraph 15 of the Plaint, the Plaintiff has adverted to seven circumstances to assert that the modified Consent Terms dated 24th August 2005 and the Decree dated 17th October 2005 were vitiated by fraud and were only intended to defeat the rights of the Plaintiffs and other heirs of Nathmal; more importantly, by suppression of material facts and false statements made to persuade this Court for passing of Consent Decree constitute fraud on this Hon'ble Court and on the Plaintiff.

21. In Paragraph 16 of the Plaint, the Plaintiff has adverted to ten circumstances to assert that the Conveyance Deed dated 31st December 2005 and Rectification Deed dated 15th January 2006 were null and void ab-initio and non est and voidable at the instance of the Plaintiff. The Plaintiff has highlighted the dishonesty of Defendant Nos.1 to 8 from the clauses of the Conveyance Deed dated 31st December 2005 in the said Paragraph.

22. In substance, the case of the Plaintiff is that the circumstances and the documents would show that Defendant Nos.1 to 10 have perpetrated fraud upon this Hon'ble Court, inasmuch as although the Defendant No.1 had a limited right and interest in Nathmal and Jankibai's estate and although he was not authorized to transfer the said property on behalf of Plaintiff and his other sisters, purported to transfer the said property on the fraudulent basis that he is the sole owner thereof. By that process, the Defendant No.1 has defrauded and deprived the sisters of their property and their share has been misappropriated by the Defendant Nos.1 to 10 acting in conspiracy and collusion with each other. According to the Plaintiff, the Defendant Nos.3 and 4 without any locus in the earlier Suit, appeared and filed false documents before this Hon'ble Court and also executed documents despite having full knowledge and notice of the lack of title of Defendant No.1. They have therefore intermeddled with the said property and falsely claim to have become rightful owners thereof. It is the Plaintiff's case that the Defendant Nos.1 to 4 have attempted to legitimize their fraud by invoking the process of this Court to persuade the Court to pass the Consent Decree. The Defendant Nos.5 to 10

have colluded with Defendants 1 to 4 in the said exercise. That Defendant Nos. 6 and 8 have signed Consent Terms without being party to the Suit. The Plaintiff asserts that she has 1/8th share in the said Jankibai's share in the suit property in relation to which the Defendant No.1 could not have exercised any right.

23. The Plaintiff on the above said assertions, has approached this Court by way of present composite Suit claiming several reliefs, inter alia to set-aside the Consent Decree and also the documents executed on the basis of said Decree being voidable at the instance of the Plaintiff. The Plaintiff has asked for the following reliefs in the Suit:

> "(a) that this Hon'ble Court be pleased to administer the estates, effect and properties of the said Jankibai (including as set out in Exhibit "B") and the said Nathmal (including as set out in Exhibit "D-1") by an under its order and direction;
>
> (b) that this Hon'ble Court be pleased to appoint some fit and proper person as the Administrator of the estates, effect and properties of the said Jankibai (including as set out in Exhibit "B") and the said Nathmal (including as set out in Exhibit "D-1") and for accounts of the said estates;
>
> (c) that this Hon'ble Court may be pleased to declare that the Plaintiff is entitled to a 1/8th share in the estate of the said Nathmal and that the estate of the said Nathmal includes the estate the said Jankibai (including her 1/3rd share in the said

property) and that the Plaintiff is hence a co-owner of the said property.

(d) that this Hon'ble Court may be pleased to declare that the Deed of Conveyance dated 31st December, 2005 being Exhibit "N" hereto. The Deed of Indemnity dated 20th January, 2004, Development Agreement dated 25th February, 2005, Irrevocable Power of Attorney dated 25th February, 2005, Agreement dated 24th August, 2005, the Consent Terms dated 25th February, 2005 and 24th August, 2005, Deeds of Transfer of Tenancy dated 31st December, 2005 and Deed of Rectification dated 15th January, 2006 are all non est and void ab initio and/or (without prejudice to the aforegoing) in any event voidable (and have been avoided by the Plaintiff)

(e) that this Hon'ble Court be pleased to call for the originals of the said documents to in prayer (D) above and that the said documents be cancelled under the provisions of the Specific Relief Act, 1963 by and under the orders of this Hon'ble Court;

(f) that this Hon'ble Court may be pleased to set aside and recall the decrees dated 3rd March, 2005 and 17th October, 2005 passed in terms of the consent terms dated 25th February, 2005 and 24th August, 2005;

(g) in addition to the aforesaid reliefs this Hon'ble Court may be pleased to order and decree Defendant No.1 to 10 jointly and severally to pay to the Plaintiff an amount of at least Rs.5.5 Crores or such other amounts as this Hon'ble Court determines, as damages for the illegal demolition of the Plaintiff's ancestral home.

(h) that this Hon'ble Court be pleased to direct Defendant Nos.2 to 4 and 22 to 26 jointly and severally to hand over the possession of the said property to the Plaintiff and the others aforesaid co-owners of the said property and to take all such steps and actions (including execution and registration of documents) as may be necessary to have the said property

transferred into the name of the Plaintiff and the other aforesaid co-owners of the said property and to have the property and municipal records rectified accordingly.

(i) pending the hearing and final disposal of the suit, the Court Receiver, High Court Bombay or any other person fit and proper be appointed as the Receiver of the properties described in Exhibit “B” and “D-1” (including the said property described in Exhibit “B” and plan marked as Exhibit “D” to the plaint and for any property/buildings/structures constructed/erected on the said property) with all powers under order XL Rule 1 of the Code of Civil Procedure, 1908;

(j) pending the hearing and final disposal of the suit, the Defendants Nos.1 to 10 and 22 to 26 by themselves, their servants or agents to be restrained by an order and injunction of this Hon'ble Court from (i) selling, disposing, alienating, transferring, mortgaging, encumbering or parting with possession of, dealing with or creating any third party rights whatsoever or holding themselves out to be owners of the properties described in Exhibits “B” and “D-1” hereto (including said property or any part thereof as described in Exhibit “B” and “D-1” and plan marked as Exhibit “D” to the plaint and with respect to any property/buildings/structures constructed on the said property); (ii) from acting pursuant to or in furtherance/implementation of the documents set out in prayer (d) above and/or the Consent Decrees referred to in prayer (f) above.

(k) pending the hearing and final disposal of the suit, the Defendants Nos.2 to 4 by themselves, their servants or agents to be restrained by an order and injunction of this Hon'ble Court from carrying on any further construction/development activity and/or applying for any further permissions for the construction/development from the municipal authorities and government in respect of the said property or any part thereof as described in Exhibit “B” and plan marked as Exhibit “D” to the plaint;

(l) interim and ad-interim reliefs in terms of prayer clause (I), (J) and (K) above;

(m) costs of this suit be provided for;

(n) such other reliefs as the nature and circumstances of the case may require and as this Hon'ble Court deems fit and proper."

24. The Plaintiff has in addition taken out Notice of Motion No. 1996 of 2007 in the Suit, praying for interim relief during the pendency of the Suit consistent with the reliefs prayer clauses (i), (j) and (k) of the plaint and further relief in terms of main substantive relief claimed in the plaint. The Defendants have appeared in the proceeding and have contested the claim of the Plaintiff. The parties have exchanged affidavits. I shall advert to the submissions made on behalf of the Defendants to oppose grant of any Interim Relief to the Plaintiff.

25. According to the Defendant No.2, the prayers in the suit is mainly for administration of the estate or suit for accounts and is not a suit for partition as such. Such a suit ought to be covered by provisions of Order 20 Rule 13. It is submitted that Nathmal died on

8th October, 1992 and a suit of the present kind, filed in the year 2007, is, therefore, barred by limitation. Inasmuch as, the cause of action to institute such a suit arose after the death of said Nathmal. It is contended that the only statement found in the plaint with regard to the limitation can be discerned from Paragraph-29A. However, the same has no relevance in relation to the suit for administration of the estate of the deceased. According to the Defendant No.2, the suit is not for possession, so as to be governed by Article 65 of the Limitation Act. Besides, the nearest article that can be invoked at the instance of the Plaintiff is Article 106 of the Limitation Act, which in fact, has no application to the present case. The only other Article is Article 113, which would require institution of suit within three years from the date, when the right to sue accrues. According to the Defendant No.2, the decisions pressed into service on behalf of the Plaintiff during the argument were inapplicable to the fact situation of the present case. I shall elaborate on this matter a little later.

26. Insofar as merits of the Plaintiff's claim is concerned, according to the Defendant No.2, the present suit by the Plaintiff is collusive suit

between the Plaintiff and Defendant No.1. It is stated that the present suit has been filed only after the reserved amount was withdrawn by the Defendant No.1. It is then contended that the sisters of the Defendant No.1 have no right whatsoever, in the suit property, as the same has been inherited by the Defendant No.1 on account of Will executed by Jankibai bequeathing her 1/3rd share in the suit property absolutely in favour of the Defendant No.1. It is then contended that there are strong circumstances to support the claim of the Defendant No.1 that after the death of Nathmal there was family arrangement arrived between the son and daughters of Nathmal, whereunder all the seven sisters of the Defendant No.1 relinquished their rights, title and interest in the suit property in favour of the Defendant No.1. It is submitted that on account of such family arrangement, none of the seven sisters asserted any right with regard to the suit property. Besides, all the outgoings in relation to the suit property was paid by the Defendant No.1 and that the Defendant No.1 was in exclusive possession of the suit property. It is further submitted that only the Plaintiff and Defendant No. 21, two sisters have come forward to challenge the claim of the Defendant No.1, whereas all other sisters

and/or their legal representatives have not chosen to support the Plaintiff and in any case three sisters have positively supported the claim of the Defendant No.1. It is submitted that the conduct of the Plaintiff shows that there was family arrangement and which was acted upon by all concerned. In so far as criticism of the Plaintiff with regard to the Defendant Nos.3 and Defendant No.4, having acted as partners of the Defendant No.2 partnership firm, even though the effect of registration of the Firm is relevant only as a rule of evidence to consider the fact that the firm is a registered firm. Whereas, even an unregistered firm can defend the suit. There is no bar in that behalf. It was then contended that grant of interim relief is essentially a discretion of the Court. The balance of convenience was in favour of the Defendant No.2, inasmuch as the Defendant No.2 acting on the Consent Terms entered into Development Agreement in respect of the suit property and in fact parted with substantial consideration amount and further created third party rights in the suit property by mortgaging the same to the bank and sale of flats in the proposed building to be constructed on the suit property. Moreover, the Plaintiff has only 1/24th share in the suit property. Further, it will have to be assumed

that the Plaintiff had knowledge about the Conveyance Deed executed in December, 2005 in favour of the Defendant No.2 by virtue of provisions of Transfer of Property Act. It is also contended that mortgagee as well as third parties, who have purchased the proposed flats are 28 in numbers, are not before the Court. Moreover, the Defendant No.2 has given commitment to MHADA to accommodate the existing tenants by providing suitable accommodation to them. Relying on the observations in the decision of the Apex Court reported in (1999) 5 SCC 222 in the case of **Bina Murlidhar Hemdev and ors. V/s. Kanhaiyalal Lokram Hemdev and ors.**, in particular, paragraph-52 thereof. It is contended that the Defendant No.2 is willing to secure the interest of the Plaintiff by offering bank guarantee of commensurate amount, which eventually will have to be paid to the Plaintiff by way of adjustment of her share in the suit property- in the event, the Plaintiff were to succeed in the suit. The Defendant No.2 submits that even the interest of the Defendant No.21 can be secured, by providing bank guarantee in the total amount of Rs.1.56 Crores being proportionate amount payable to the Plaintiff and Defendant No.21 towards their share out of the consideration amount under the

Conveyance Deed. This offer is made without prejudice to the rights and contentions of the Defendant No.2 including the fact that it is the Defendant No.1, who has given indemnity to the defendant No.2 to secure interest of the Defendant No.2 in the event of title of Defendant No.1 in respect of the suit property was put in issue by any other heirs of Nathmal Murarka. It is also contended that in fact the present suit as filed by the Plaintiff is not maintainable in view of the bar under order 23 Rule 3A of C.P.Code. Inasmuch as, the Plaintiff is claiming through Nathmal Murarka, who was named as Defendant in the former suit, in which consent terms were filed. As Nathmal Murarka was party to the suit, it is not open to the Plaintiff to question the Consent Terms by means other than the remedy provided under Order 23 Rule 3A of C.P.Code. In any case, no separate suit challenging the Consent Terms so entered was maintainable at the instance of the Plaintiff.

27. The Defendant No.3 has more or less adopted the stand of the Defendant No.2. Counsel for the Defendant No.3 however, emphasised the point that present suit was barred by law of limitation.

It was argued on behalf of the Defendant No.3 that neither Article 65 nor Article 106 of the Limitation Act will apply to the administration suit and that at best, the present suit will be governed by the provisions of Article 113 of the Limitation Act. However, the same is barred by Limitation. Counsel for the Defendant No.3 would argue that there is no merit in the stand taken on behalf of the Plaintiff that the Defendant No.3 had no authority to execute the Consent Terms or the Development Agreement for and on behalf of the Defendant No.2 Partnership firm.

28. The Defendant No.1 is independently represented by the Counsel before this Court. Even according to the said Defendant, the present suit was barred by law of limitation. Counsel for the Defendant No.1 forcefully argued that the plea of the Defendant No.2 that the present suit, is a product of collusion between the Plaintiff and Defendant No.1, is ill-advised and without any basis. Learned Counsel for the Defendant No.1 in the first place submitted that Will was executed by Jankibai in relation to her 1/3rd share in the suit property bequeathing the same absolutely to the Defendant No.1. As

a result of the said Will, the Defendant No.1 had authority to deal with the 1/3rd share in the suit property. It was next argued that the claim of the Defendant No.1 that there was family arrangement in 1992 is more probable, though disputed by the Plaintiff and Defendant No.21. It was argued that if that claim of the Defendant No.1 was to be accepted, in that case also the validity of the Consent Terms or for that matter execution of the Development Agreement in favour of the Defendant No.2 cannot be doubted. Significantly, after the argument of the Plaintiff and Defendant No.2 were fully heard when the counsel for the Defendant No.1 was called upon to address the Court on June 19, 2007, he pointed out that the Defendant No.1 has recently come across certain documents, which were very crucial for decision of the case, which he would like to place on record. Inspite of opposition from the Plaintiff, Defendant No.1 was given opportunity to place the said documents alongwith the affidavit. Accordingly, the Defendant No.1 filed further affidavit in this Court sworn on 20th June, 2007 mentioning the circumstances, in which the documents accompanied to the affidavit became available to the Defendant No.1 recently. The substance of the stand taken in the affidavit is that there was

contemporaneous material to show that Jankibai executed Will bequeathing her 1/3rd share absolutely in favour of the Defendant No.1 dated 25th April, 1955. There was material to suggest that the probate proceeding in respect of the suit Will was instituted in May, 1968. The Defendant No.1 has also relied on the Bank statement to indicate that payment referred to in the Will has been made to the sisters after the marriage (in the sum of Rs.10,000/-).

29. The stand taken in the further affidavit is however, challenged by the Plaintiff as well as the Defendant No.21 by pointing out the fallacy in the claim of the Defendant No.1 in their reply affidavit dated 21st June, 2007. In view of the stand taken by the Defendant No.1 that some probate proceedings were instituted in this Court in May, 1968, in relation to the Will executed by Jankibai, besides the certificate relied by the Plaintiff at page 300 of the paper book, for the purpose of reassurance, the Prothonotary and Senior Master was called upon to submit report as to whether there was any record to show that Will of Jankibai was presented in this Court in any probate proceeding or otherwise. The Prothonotary submitted her first report on 29th June, 2007, which reads thus:

> "1. I directed the staff members of the Testamentary Department to trace out the Original Will of the deceased viz. Jankibai G. Gangabhushan in the year 1968 as directed by Your Lordship. Put up herewith is a report dated 27th June, 2007 submitted by the Testamentary Department. In the said report, it is stated that the staff members of the Testamentary Department took search of the strong room wherein the Original Wills are kept in safe custody, to trace out as to whether the original will of the deceased viz. Jankibai G. Gangabhushan is lodged in this Registry or not. After taking search of the strong room they found that there is no will of the said deceased lying in the strong room for

> the period from 1968 to 1971. Thereafter the staff members of the Testamentary Department have also taken search of the old records to trace out as to whether any Petition is filed during the period from 1968 to 1971 in respect of Succession Certificate for certain debts and securities belonging to the deceased Jankibai Gangabhushan so also Letters of Administration to the property and credits of the said deceased Jankibai Gangabhushan as also any Petition for Probate of the last will of the deceased Jankibai Gangabhushan. However, they did not find any Petition in connection with the said deceased was filed during the period from 1968 to 1971."

The Prothonotary and Senior Master was called upon to submit further report stating the position from 1968 onwards till date. Accordingly, further report has been submitted by the Prothonotary on 11th July, 2007, which reads thus:

> "1. I directed the staff members of the Testamentary Department to take search of the original Will of the deceased viz. Jankibai G. Gangabhushan and so also to find out as to whether any Probate Petition has been filed in respect of the Will of the deceased viz.Jankibai G. Gangabhushan starting from the year 1968 till date. Accordingly the staff members of the Testamentary Department took search of the same and submitted their report dated 11th July, 2007. Put up herewith Flat "A" is a report dated 11th July, 2007 submitted by the Testamentary Department for Your Lordship's perusal. In the said report, it is stated that the staff members of the Testamentary Department verified and checked physically the Records and

> Proceedings of the Testamentary matters from 1968 to 1976 and 1979 to ascertain as to whether any Probate Petition has been filed in respect of the Will of the deceased viz., Jankibai G. Gangabhushan. Thereafter, the staff members also verified from the Register of the Testamentary matters for the year from 1977, 1978, 1980 to 2007 to ascertain as to whether any Probate Petition has been filed in respect of the Will of the said deceased. However they did not find any Probate Petition in respect of the Will of the said deceased.
>
> 2. In the said report, it is further stated that the staff members also took search of the strong room wherein the original Wills are kept in safe custody, to trace out as to whether the original Will of the said deceased is filed during the period from 1968 to 1990 but did not find any Will of the said deceased."

30. On perusal of both these reports, there is no doubt that no Will of Jankibai is either in custody of this Court or subject matter of any Probate proceedings- as is evident from the records of this Court verified since 1968. It is not the case of the Defendant No.1 that any probate proceedings are filed prior to 1968.

31. As above reports were submitted directly to me by the Prothonotary, when the matter was listed on 30th July, 2007, the Counsel appearing for the parties were apprised about the outcome of the investigation done by the Prothonotary to trace out the Will of

Jankibai. Copies of the reports were made over to the Counsel for the parties. As no further submission is made by the Counsel in the context of these reports, I have proceeded to decide the Notice of Motion.

32. During the pendency of the Notice of Motion, one Surendra K. Shah has filed Chamber Summons for intervention and impleadment in the Suit as necessary party on the ground that he was the tenant in the Suit property and is likely to be affected by the outcome of the present proceedings. It was argued on his behalf that he and other similarly placed tenants have been displaced from the suit property by the Developers with assurance to provide suitable accommodation in lieu of their tenanted premises in the Suit property. It was submitted that the Court may protect the interest of the tenants.

33. The points that would arise for my consideration in the present Motion are as follows:

(a) Whether the Plaintiff has made out prima facie case ?

(b) Whether the balance of convenience is in favour of the plaintiff?

(c) Whether the Plaintiff would suffer irreparable loss and injury if the Interim Relief was to be refused?

(d) What order ?

34. Before dealing with the merits of the case, I shall straightaway deal with the plea taken on behalf of the Defendants that the suit is barred by law of limitation. For considering the said objection, it is necessary to analyse the frame of the Suit.

35. The Plaintiff has approached this Court claiming to be grand-daughter of late Jankibai. It is the Plaintiff's case that said Jankibai died intestate on 18th May, 1956. After the demise of Jankibai her only son Nathmal succeeded to her estate, including 1/3rd share in the suit property. At the relevant time, Nathmal had one son(Defendant No.1) and seven daughters. Nathmal died on 8th October, 1992. The fact that Nathmal died intestate is not in dispute at all. It is the case of the Plaintiff that after the demise of Nathmal, property devolved upon all

the heirs and Legal Representatives of Nathmal, namely, one son and seven daughters in equal proportion. In other words, the Plaintiff being one of the daughters had equal share alongwith the Defendant No.1 and Defendant Nos. 17 to 21 and her sister Laxmibai who expired on 16th November, 2006 leaving behind her heirs and legal representatives(Defendant Nos. 11 to 16). The Plaintiff has filed this suit in the capacity as one of the heir and beneficiary of the estate, properties and credits of the late Nathmal Murarka. It is the case of the Plaintiff that in January, 2007, the Plaintiff had 1/8th share in Nathmal's estate (including in the 1/3rd share of the said Jankibai of the said property) jointly with all the other heirs of the deceased. However, disregarding the rights of other heirs of Nathmal, the Defendant No.1 by playing fraud on Plaintiff and other heirs as also on this Court, executed Consent Terms transferring the entire 1/3rd share of Jankibai, which devolved upon Nathmal, in favour of Defendant Nos. 2 to 4 and 20 to 26 under the Consent Terms submitted before this Court and the Development Agreement and Conveyance Deed. It is in this backdrop the Plaintiff has approached this Court for the reliefs claimed in the plaint which are already reproduced earlier. Indeed, the first relief

claimed by the plaintiff does indicate that the Plaintiff has invoked jurisdiction of this Court by way of suit for administration of the estate of the deceased. Besides the said relief, the Plaintiff also seeks declaration that the Plaintiff is entitled to 1/8th share in the estate of Nathmal and the estate of Nathmal includes the estate of said Jankibai (including her 1/3rd share in the suit property) and that the Plaintiff is co-owner of the suit property. The Plaintiff has then sought declaration that the conveyance deed dated 31st December, 2005 (Exh.N), Deed of Indemnity dated 20th January, 2004, Development Agreement dated 25th February, 2005, Irrecoverable Power of Attorney dated 25th February, 2005, Agreement dated 24th August, 2005, Consent Terms dated 25th February, 2005 and 24th August, 2005, Deed of transfer of Tenancy dated 31st December, 2005 and Deed of Rectification dated 15th January, 2006 are all non est and void ab initio and in any case, voidable at the instance of the Plaintiff, who is one of the co-owner. The Plaintiff has also asked for relief that the above said documents be cancelled under the provisions of Specific Relief Act by and under the orders of this Hon'ble Court. The Plaintiff has also asked for setting aside and recalling of decrees dated 3rd March, 2005 and 17th

October, 2005 passed in terms of the Consent Terms dated 25th February, 2005 and 24th August, 2005 and for further relief directing the Defendant Nos. 1 to 10 jointly and severally to pay to the Plaintiff an amount of atleast Rs.5.5 Crores or such other amounts, as would be determined by this Court as damages for illegal demolition of the Plaintiff's ancestral home. In prayer clause (h), the Plaintiff has asked for direction against Defendant No.2 to 4 and 22 to 26 jointly and severally to hand over possession of the suit property to the Plaintiff and other co-owners of the suit property and to take all such steps and actions (including execution and registration of documents), as may be necessary to have the said property transferred into the name of the Plaintiff and other co-owners of the suit property and to have the property and municipal records rectified accordingly.

36. In substance, the present suit is a composite suit for relief of administration of the estate of the deceased, as also for declaration and possession. If so, the stand taken on behalf of the Plaintiff that such a suit will be governed by the provisions of Article 65 and/or Article 110 and/or Article 106 and/or Article 113 of the Limitation Act

merits consideration. As the Plaintiff is seeking declaration, Article 58 of the Limitation Act may also be attracted in that regard.

37. To buttress the plea that the Suit is within limitation, the Plaintiff has rightly pressed into service legal position articulated on the basis of decisions, in the commentary of law of Limitation of U.N.Mitra, 12th Edition of 2006, which reads thus:

> "17. **Article 106 and Administration suits.-** The term "administration suit connotes a relief prayed for rather than a cause of action. An administration suit is, in essence, one in which the plaintiff seeks special relief, namely, the administration of the estate of a deceased person, be he a debtor, a testator or an intestate, by an under the direction of the Court for the better realisation of the specific claim regarding which the plaintiff has a cause of action. Naturally the period of limitation applicable to such a suit would depend on who the plaintiff is and what his specific cause of action is. It is for that reason that the Limitation Act has not explicitly provided a period of limitation for such a suit. If the suit is by a creditor the cause of action is to recover the debt and the appropriate article applicable to a suit for debt would govern and the period of limitation would be 3 years. If the suit is brought by one or more of the heirs of a deceased person against others in possession of the estate for a proper distribution of such estate where no probate, letters of administration or other representation has been granted, the period of limitation would be 12 years under Article 120 of the Act of 1908 (now Article 65) for immovable property or 6 years under Article 120 of that Act(now Article 113) for

> movable property. If the suit is to recover a legacy the period of limitation would be 12 years under Article 123(now Article 106). It is the real nature of the claim that counts and if the suit for legacy involves administration of the estate of the deceased this article governs. If the suit is by a person entitled to a part of the interest of a co-heir in the estate as against certain other heirs for administration this article would not apply as the suit would be one between co-heirs."
>
> (emphasis supplied)

38. In the present case the assertion of the Plaintiff about knowledge of fraud is in January 2007. Assuming that plea was not to be accepted, the Consent Terms are dated 26th February, 2005 on the basis of which all subsequent actions and documents are founded. Even then the Suit is within three years from that date. The principle stated in the commentary of Law of Limitation of U.N.Mitra which is referred to earlier is expounded in the decision of the Privy Council reported in 1941 ILR page 8 in the case of Mohomedally Tyebally & Ors.. V/s. Safiabai & Ors. It was noted that it is necessary to direct attention to the frame and scope of the suit. In that case, the Court went on to hold that in effect the plaint reflected that it merely asked for 1/6th share out of what was received by the widow and children, as representating his estate, to be given to the persons entitled therefor.

The Privy Council upheld the view of the High Court that in a suit of that kind Article 123 of the Old Limitation Act(now Article 106 of the new Act) was applicable. The Court went on to hold that heirs of a Mohomedan succeed to his estate in specific shares as tenants in common and the plaintiff's suit against the son and daughters of Ebrahimji for due administration of what came to their hands as property left by their father is governed as regards immovable property by Article 144 of Old Limitation Act(which is Article 65 of the new Limitation Act) and as regards movable by Article 120 of old Limitation Act(equivalent to article 113 of the New Limitation Act).

39. Reliance is then placed on the decision of our High Court in the case of Balkisan D. Sanghvi v/s. Kiron D. Sanghvi reported in 2006 (3) Bom.C.R 648, which takes the view that there is no reason which would require the Plaintiff to file separate suit for the diverse reliefs claimed by the Plaintiff. It is further held that there is no bar to a Court, in an administration suit, to determine validity of transaction allegedly entered into by or on behalf of the deceased, whose estate is sought to be administered. In fact, the Court would more readily permit to

challenge to such transaction in the administration suit itself to avoid multiplicity of proceedings. Counsel for the Plaintiff has relied on the case of Nazarali Kazamali V/s. Farhanbai reported in AIR 1975 Guj. 81. Emphasis was placed on the exposition in paragraphs 10 to 12 of this decision. In that, the next of kin of a deceased person who died intestate may file suit for administration of the estate and combine other reliefs therewith, using relief of administration as umbrella and not itself a cause of action.

40. Reliance is also placed on the decision of the Apex Court in the case of Mohd. Zainulabudeen (since deceased) by Lrs. V/s. Sayed Ahmed Mohideen & Ors. reported in (1990) 1 SCC 345. In paragraph-12, the Apex Court has observed that it is well settled that where one co- heir pleads adverse possession against another co-heir then it was not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. The possession of one co-heir is considered in law, as possession of all coheirs. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. It is further observed that it is

settled rule of law as between co-heirs that there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to construe ouster. It is rightly submitted on behalf of the Plaintiff that the plea taken by the Defendant No.1 being one of co-heir or for that matter other co-heirs supporting his claim, is not one of ouster or adverse possession as such. On the other hand, their claim is that the Defendant No. 1 has become exclusive and absolute owner of the 1/3rd share in the suit property -firstly by virtue of the Will executed by Jankibai bequeathing her right in the property in favour of the Defendant No.1; and in any case by virtue of family arrangement arrived at in 1992 after the demise of Nathmal. The contesting defendants can succeed in resisting the claim of the Plaintiff, even if they were to establish one of the above stand. However, if both the claims of the contesting Defendants, referred to above, were to be rejected or discarded, in that case, it will necessarily follow that the possession of the suit property with the Defendant No.1 was for and on behalf of all the co-owners; as in law there is presumption of jointness of possession of the co-owners. In that case, as the cause of action

for the Plaintiff to institute suit for administration of the estate of the deceased is with specific reference to and emanates from the consent terms and the consequent Development Agreement and Conveyance Deed in relation to the suit property being product of fraud played on the other co-heirs as well as the Court, on acceptance of that plea of the Plaintiff, estate of the deceased will have to be administered in accordance with the law and relief of declaration and possession granted to the Plaintiff. In the case of this kind, the date of knowledge of fraudulent transfer of property or estate of the deceased by the defendant No.1 in favour of the third party, would be the relevant date for reckoning limitation period. At any rate, the limitation period will start running from the date of execution of the Consent Terms and consequential documentation in the form of Development Agreement, irrevocable Power of Attorney and Conveyance Deed. The Consent Terms and the Development Agreement have been executed on 25th February, 2005, whereas, the suit is filed on 11th April, 2007. Therefore, by no standard it can be said that this suit claim is barred by law of Limitation.

41. Reliance is also rightly placed on the observations of the Apex Court in the case of Karbalai Begum V/s. Mohd. Sayeed and anr. Reported in AIR 1981 SC 77. In paragraph-7 of this decision, it is observed that it is well settled that mere non participation in the rent and profits of the land of co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. It is further held that co-sharer would become constructive trustees on behalf of the Plaintiff and the right of Plaintiff would be deemed to be protected by the trustees. This statement of law would squarely apply to the case on hand, as it will have to be held that the Defendant No.1 enjoyed possession of the suit property for himself and on behalf of the co-heirs of Nathmal. In the case of Mohammad Baqar and ors. V/s. Naim-un-Nisa Bibi & ors. Reported in AIR 1956 S.C.548, in paragraph-7 the Apex Court observed that where the parties to the action are co-sharers and as under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is denial of their rights to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period. In the present case, the plea

of ouster is not invoked by the Defendants. However, the Defendant No.1's case is that none of the other co-heirs asserted their rights in respect of the suit property atleast from 1992 as per the understanding. That case made out by the Defendants is on the assertion of inaction of the Plaintiff and other co-heirs. It is not the case of the Defendant No.1 or for that matter any other Defendants that the Defendant No.1 asserted absolute right in respect of the suit property to the exclusion of the other co-heirs to their knowledge by denying their rights, as such. Counsel for the Plaintiff also relied on the decision of the Apex Court in the case of Annasaheb Bapusaheb Patil and others V/s. Balwant @ Balasaheb Babusaheb Patil (dead) by Lrs. & heirs. reported in AIR 1995 S.C.895 to buttress the argument that possession of the Defendant No.1 being only as one of the co-owner was for himself and on behalf of the other members. Indeed, this decision deals with the case of Joint Hindu Family properties. However, that makes no difference. For, the same principle applies even in the case of property held jointly with other co-owners. The Counsel for the Plaintiff has also relied on the decision of the Apex Court in the case of Md.Mohammad Ali(dead) by Lrs. V/s. Jagadish Kalita & Ors. reported

in (2004) 1 SCC 271. In paragraph 19 of this decision, the Court has observed that long and continuous possession by itself, it is trite, would not constitute adverse possession. Moreover, even non-participation in the rent and profits of the land to co-sharer does not amount to ouster so as to give title by prescription. It is further held that co-sharer has become constructive trustee of other co-sharer and right of the parties be deemed to be protected by the trustees. The theory of ouster would become relevant only when one co-sharer by his conduct or action indicates clear ouster of other co-sharers by denying the title of other co-sharers or disputing their right in the suit property. No such case has been made out by the Defendants against the Plaintiff. More or less similar principle is restated in the decision reported in AIR 1971 S.C. 2184 in the case of Syed Shah Gulam Ghouse Mohiuddin and ors. V/s Syed Shah Ahmad Mohiuddin Kamisul Qadri(dead) by Lrs. In paragraph-12, the Court went on to observe that the heirs succeed to the estate as tenants in common in specific shares. Where the heirs continue to hold the estate as tenants in common without dividing it and one of them subsequently brings a suit for recovery of the share the period of limitation for the suit does

not run against him from the date of the death of the deceased but from the date of express ouster or denial of the title and Article 144 of Schedule I to the Limitation Act, 1908 would be the relevant Article. In paragraph-19 the Court has further observed that possession by one co-owner is not by itself adverse to other co-owners. On the contrary, possession by one co-owner is assumed to be possession of all the co-owners unless it is established that the possession of the co-owner is in denial of the title of the other co-owners and the possession is in hostility to co-owners by exclusion to them. Indeed, the decisions referred to above are not necessarily on the point of limitation. However, the legal position stated therein is relied to buttress the argument that on such finding it will necessarily follow that the present suit is within limitation.

42. To my mind, the argument regarding suit being barred by limitation canvassed on behalf of the Defendants, is devoid of merits. As mentioned earlier, from the frame of the suit, it is obvious that it is a composite suit for administration of the estate of the deceased on the basis of specific cause of action emanating from execution of

fraudulent consent terms and development agreement and conveyance deed in relation to the suit property, which was done by playing fraud on the Plaintiff and other co-owners of Nathmal and more particularly, fraud on this Hon'ble Court. The suit is therefore, also for declaration in that behalf and for consequential reliefs, including recalling decree passed on the basis of the Consent Terms and for possession of the suit properties to be redelivered to the co-owners. The cause of action for this action therefore, has no relevance to the date of death of Nathmal. In that, the death of Nathmal cannot be the starting point of limitation period. Significantly, it is not the law that the co-heirs shall proceed to file suit for partition soon after the death of their predecessor in-title. Nor the law makes it imperative to ask for relief of partition alongwith the relief of declaration that the Plaintiff is entitled to a particular share in the property left behind by the deceased, who died intestate. Even in the present suit as of now there is no relief of partition of the property by metes and bounds or otherwise. The substantive relief, inter alia, is for declaration and possession, in respect of which the suit is well within limitation. On the analysis of the frame of the suit on hand, the decision pressed into

service by the counsel for Defendant No.2 in the case of Mt.Amir Bi V/s. Abdul Rahim Sahib and Ors. (AIR 1928 Madras 760) and Abdul Hussain Adamji Masalawalla V/s. Mohomedally Adamji Masalawalla & ors. AIR 1922 Bom.443 will be of no avail.

43. Counsel for the Plaintiff has rightly invited my attention to the Legislative change brought about under the new Limitation Act. Section 17 of the Old Limitation Act did not contain the specific provision such as ... “to exclude limitation period”, whereas the new Limitation Act of 1963 has added the specific circumstance provided in section 17(a), where the suit or application is based upon allegation of fraud of the Defendant or respondent or his agent in which case, the limitation would begin from the date when the fraud was discovered. In my view therefore, it is not possible to accede to the argument of the Defendants that the present suit is barred by law of Limitation.

44. I shall immediately refer to the argument canvassed on behalf of the Defendants that the suit was barred by provisions of Order 23 Rule 3A. According to the Plaintiff however, Order 23 Rule 3A would bar

institution of fresh suit to challenge the validity of Consent Decree, only at the instance of the party to the suit. It is argued that the plaintiff is a stranger to the Consent Decree, for which reason, the Plaintiff is entitled to pursue present remedy of suit for declaration, as is filed. In support of this argument, reliance is placed on the decision of the Allhabad High Court in the case of Smt.Suraj Kumari V/s. District Judge, Mirzapur & Ors. AIR 1991 Allahabad page 75. The Allahabad High Court on considering legal position has held that the provisions of Order 23 Rule 3A is confined only to the parties to the suit and does not debar the stranger from instituting suit to challenge the Consent Terms, which is adverse to the interest of the stranger. Reliance is also placed on the decision of the Karnataka High Court in the case of Siddalingeshwar and ors. V/s. Virupaxgouda & ors. Reported in AIR 2003 Karnataka 407, It has taken the same view as that of Allahabad High Court. The Karnataka High Court has observed that a person who is not a party to the suit, cannot obviously file an application in the suit or an appeal. The only remedy for him is to bring a separate suit seeking appropriate relief, which remedy remains unaffected. Reliance is also placed on the decision of the Apex Court in the case of Banwari

Lal V/s. Smt.Chando Devi(through L.R.) & anr. Reported in AIR 1993 SC 1139, in support of the plea that separate suit by a stranger is permissible. Reliance is also placed on the decision in the case of Pushpa Devi Bhagat V/s. Rajinder Singh & Ors. Reported in (2006) 5 SCC 566. In paragraph 17 of this decision, while considering position emerging from the amended provisions of Order 23, it is noted that Consent Decree is nothing but contract between the parties superimposed with the seal of the approval of the Court. It is further held that the validity of Consent Decree depends only on the validity of the agreement or terms, on which it is made. It is thus argued that a stranger who is not party to the Consent Decree will not be bound by such Consent Decree. The stranger is therefore, entitled to bring separate suit and is not debarred from doing so, not being party to the Consent Decree. I find force in the submission under consideration canvassed on behalf of the Plaintiff.

45. To get over this position, it was argued that the Plaintiff was claiming through Nathmal, who was party to the suit. For that reason the bar under Order 23 Rule 3A will operate against the Plaintiff as

well. There is no substance in this submission. Indeed, the Plaintiff is claiming right in respect of the estate of Nathmal. It is also true that Nathmal was party to the former suit. However, it is not in dispute that Nathmal died on 8th October, 1992 leaving behind Defendant No.1 and seven married daughters i.e. the Plaintiff, Defendant Nos. 17 to 21 and Laxmibai as his heirs and legal representatives. The fact that Nathmal died intestate is not in dispute. An order was passed in the former suit on 7th January, 1993, requiring the advocate for the Defendants therein to furnish names of the heirs of the Nathmal to the Attorneys for Plaintiff. Admittedly, the heirs of Nathmal were never brought on record in that suit. It is the case of the Plaintiff that the Plaintiff was not aware about the former litigation. Suffice it to observe that the Consent Terms as were executed, Nathmal was not party thereto. The suit against Nathmal had already abated. In any case, as the Plaintiff was not party to the said suit nor Nathmal was party to the Consent Terms and the Consent Decree, the fact that the Plaintiff is claiming right in the estate of Nathmal, by itself therefore, cannot be the basis to rule against the Plaintiff that separate suit by the Plaintiff was barred by Order 23 Rule 3A.

46. That takes me to the main issue as to what is the status of the parties with reference to the suit property. It is not in dispute that the suit property was purchased by three sisters in laws Jankibai, Narmadabai and Shivabai in equal shares having 1/3rd ownership right in the suit properties for consideration from one Shiv Prasad. According to the Plaintiff, Jankibai died intestate on 18th May, 1956 leaving behind Nathmal as her only heir and legal representative, who in turn inherited 1/3rd share in the suit properties. On the other hand, it is the case of the Defendant No.1 that Jankibai left behind a Will bequeathing her share absolutely in favour of the Defendant No.1. If the later case of the Defendant No.1 was to be accepted, then no further investigation would be necessary. However, after going through the pleadings on record and the contemporaneous record available, it is difficult to accept the case made out by the Defendant No.1 about the Will executed by Jankibai bequeathing her 1/3rd share in the suit property absolutely in favour of the Defendant No.1. I shall elaborate on this aspect a little later. As mentioned earlier, after the demise of Jankibai, 1/3rd share of the Jankibai in the suit property devolved on her only son and legal representative Nathmal as his

separate property; who in turn died intestate on 8th October, 1992 leaving behind one son and seven married daughters, namely, the Plaintiff, Defendant No.1, Defendant Nos. 17 to 21 and Laxmibai. The fact that Nathmal died intestate is not in dispute at all. In other words, on the death of Nathmal 1/3rd share in the suit property, which had devolved on Nathmal would be naturally inherited by all his children equally. In other words, the Plaintiff, Defendant No.1, Defendant No.17 to 21 and Laxmibai acquired right, title and interest in the said 1/3rd share in the suit property originally held by Jankibai, in equal proportion. It is nobody's case that the coheirs of the Nathmal(seven sisters) had given any authority to Defendant No.1 to transfer or sell their shares in the suit property. Thus understood, the Defendant No.1 had no authority whatsoever to transfer right, title and interest of the coheirs to the extent of their share in the suit property. On the above findings, the Plaintiff is justified in asserting right in respect of the suit property and claiming declaration and consequential reliefs in the present suit to preserve the property and for allocation of shares therein to the Plaintiff as also to the other co heirs.

47. I shall now advert to the theory propounded by the Defendant No.1 of execution of a Will by Jankibai bequeathing her 1/3rd share absolutely to the Defendant No.1. In this context it is relevant to note the circumstances, which run counter to that theory. Admittedly, Jankibai died on 18th May, 1956. At the relevant time, the Defendant No.1 was a minor. The Defendant No.1 had submitted Deed of Indemnity to the Collector of Mumbai/City Survey and Land Record of Mumbai to record a change of name in the Property Card in relation to the suit property dated 20th January, 2004. In the said indemnity the defendant No.1 has declared that “Jankibai died intestate” on 18th May, 1956 and “Nathmal died intestate” on 8th October, 1992. The Defendant No.1 has then mentioned that “he is the only heir and legal representative in respect of the estate of the deceased”. There is no mention about any Will executed by Jankibai bequeathing her 1/3rd share in favour of the Defendant No.1. The plea taken by the Defendant No.1 before this Court however, is that the indemnity was prepared without application of mind and as per the requirement of the agent, who was employed for effecting the mutation. This plea is taken for the first time in the present proceeding.

48. Be that as it may, the Defendant No.2(M/s. Vivek Enterprises) filed suit in this Hon'ble Court being Suit No.1092 of 1981 for specific performance of an alleged oral agreement dated 26th December, 1977 between Shivbai and defendant No.2 for sale of the suit property. In the said suit, the case made out by the Defendant No.2 was that Shivbai had entered into an oral agreement of sale of the suit property in relation to her 1/3rd share as well as the share of the other co-owners. In this backdrop, the Defendant No.2 impleaded Krishnakumar Nathmal Murarka (i.e. Defendant No.1 herein), the said Nathmal(predecessor if the Plaintiff), Radheshyam Prahladrai Murarka (i.e.Defendant No.5 herein), Pawankumar Radheshyam Murarka (Defendant No.7). Significantly, none of the members of the branch of Shivbai were made party defendants to the suit. As stated earlier, Nathmal died intestate on 8th October, 1992 leaving behind one son and seven married daughters. The fact that Nathmal died intestate is not in dispute. As noted earlier, the suit filed by the Defendant No.2 being Suit no.1092 of 1981 was dismissed for default on 7th June, 2001, which order was set aside and the suit was restored to file by

order dated 15th December, 2004 passed in Notice of Motion No.3579 of 2004. Later on, the Defendant No.1 alongwith the Defendant Nos. 5 and 8 herein filed Notice of Motion No.44 of 2005 for setting aside order dated 15th December, 2004 on the assertion that the minutes of the order dated 14th December, 2004 signed by the advocates were without authority of the Defendants. Significantly, in the affidavit in support of the said Notice of Motion No.44 of 2005, the Defendant No.1 has asserted that the Defendant No.2(Plaintiff in that suit) was aware of the death of Nathmal and yet his heirs were not brought on record for which reason the suit had abated. It is also stated on behalf of the Defendant No.1 that as the suit against Nathmal had abated; without setting aside abatement, the suit could not have been restored as it cannot proceed against the dead person or his heirs. Even in this affidavit, there is no reference to the fact of execution of any Will by Jankibai in favour of the Defendant No.1.

49. The existence of the Will for the first time, has been recorded in the Development Agreement dated 25th February, 2005 which constituted part of the Consent Terms of the same date. It is stated in

recital-5 of the Development Agreement that Jankibai during her lifetime executed Will bequeathing her entire undivided share, right, title and interest in the suit property to the Defendant No.1. It is further stated that the Defendant No.1 caused to file testamentary petition in this Hon'ble Court and the original Will was filed in the said proceeding. It is also stated in the Development Agreement that the Defendants did not pursue the said probate application and the original Will is lying in this Hon'ble Court. Further, even after searching the records of this Hon'ble Court neither Petition nor the Will can be found. It is thus declared that the Defendant No.1 is unable to locate even a copy of the said Will. In the Development Agreement, it is further mentioned that the developers agree not to insist on the letters of administration or the probate of estate.

50. There is force in the submission of the Plaintiff that the theory of existence of some Will of Jankibai has advisedly been introduced in the Development Agreement not only with a view to denude the other co-heirs of the Nathmal of their right, title and interest in the suit property, but because it is only on that basis the Defendant No.1,

and Defendant No.2 in turn, could justify and provide legal sanctity to the transaction in respect of the suit property. In absence of Will, as mentioned earlier, the property would devolve upon Nathmal as his separate property after demise of Jankibai, as is the case of the Plaintiff. Interestingly, it is now for the first time, in the present proceeding, the Defendant No.1 has produced copy of the Will and other documents to contend that the said documents are contemporaneous record to substantiate existence of such a Will. In so far as Exh. No.1 to the affidavit of the Defendant No.1 dated 20th June, 2007 is concerned, that is a letter sent by the Chartered Accountant to Third Assistant Collector of Estate Duty dated 24th June, 1969. In the first place, the name of the Chartered Accountant is not appearing in the said document. According to the Defendant No.1 the same was sent by M/s. M.L.Bhuwania and Company. This document however, does not specifically refer to any Will of Jankibai. Clause-4 only refers to copy of Will. The recital mentions that Nathmal G. Murarka is legal heir of Jankibai G. Gangabishen. That description would suggest that the Will was in favour of Nathmal and not the Defendant No.1. The next document relied by the Defendant No.1

Exh.2, which is a copy of the Internal Memo of M.L.Bhuwania and Company indicating that they had appeared before one Mr. P.M.Rele, Third Assistant Estate Duty Controller with one Nathmal Murarka. The noting obviously refers to the name Mr.N.G.Muraraka i.e. Nathmal Murarka. Once again item 6 and 7 make reference to copy of Will and Probate Petition respectively filed before 20th June, 1969, without mentioning details as to the Will executed by whom and in whose favour. In so far as Exh.3 appended to the said affidavit, it is a memo issued by M/s. Thakurdas and Company in relation to probate petition of 1968. The name of the deceased is mentioned as Jankibai Gangbishan and the Petitioner is none else but the Plaintiff's husband Mr.Bajrang Lal Shivchand Rai(Ruia). According to the copy of the Will now propounded by the Defendant No.1, it has mentioned the Executor of the Will to be Bajrang lal Shivchand Rai. The Memo issued by the advocates M/s. Thakurdas and Company is dated 9th May, 1968. This document does not take the matter further for the Defendant No.1, as it makes no reference to the fact that the Will was executed in favour of Defendant No.1. The Defendant No.1 has then relied on the passbook entries Exh.4 to suggest that he paid sum of

Rs.10,000/- to his sister after her marriage. However, the Plaintiff and the Defendant No.21 by filing reply affidavit have countered that case of the Plaintiff and have asserted that the amount of Rs.10,000/- was not paid under the alleged Will, but that amount was disbursed out of the marriage gifts received. Besides, it is positively stated on behalf of the Plaintiff and Defendant No.21 that Jankibai did not know to write and read and used to put her thumb impression, whereas the alleged Will produced by the Defendant No.1 shows the signature of Jankibai in devnagri script, which signature has been disputed. The Plaintiff has also alleged that her husband had no knowledge whatsoever about appointment as executor of the alleged Will. It is also pointed out by the Plaintiff and Defendant No.21 that the alleged Will produced by the Defendant No.1 makes no reference to the eldest grand-daughter i.e. Laxmibai and the Plaintiff, which is unusual and unnatural. Moreover, except mentioning the names of the witnesses, no details are given regarding their address nor the date of witnessing the alleged Will. Suffice it to observe that there are several suspicious circumstances which would persuade this Court to hold that the theory of Will has been introduced by the contesting Defendants advisedly, so

as to create a cloud of doubt. At any rate, admittedly the said alleged Will has not been probated so far.

51. To put at rest the controversy raised by the Defendant No.1 that Probate Petition in respect of alleged Will was filed in this Court, I thought it appropriate to invite report of the Prothonotary and Senior Master in that behalf. I have already reproduced two reports received from the Prothonotary and Senior Master, which leaves no manner of doubt that neither the original Will of Jankibai nor any probate proceeding in relation to such Will is in the records of this Court. This lends credence to the case of the Plaintiff that the theory propounded by the Defendants of inheritance of the suit property exclusively by the Defendant No.1 on account of alleged Will in respect of suit property, is palpably false and after thought. It necessarily follows that the Defendants have indulged in playing fraud not only on the Plaintiff and other co-heirs of Nathmal, but also on this Hon'ble Court in persuading this Court to believe that the Defendant No.1 had full authority to deal with the 1/3rd share in the suit property, originally owned and possessed by Jankibai and after her demise, having

inherited the same. Be that as it may, I have no hesitation in discarding the theory of exclusive inheritance of the suit property by Defendant No.1 as per the Will in respect of the property, to the extent of 1/3rd share therein originally held by Jankibai. If this theory is discarded, it necessarily follows that after the demise of Jankibai, 1/3rd share devolved upon Nathmal being the only son and legal representative, who inherited the same as his separate property. After the demise of Nathmal, as Nathmal died intestate, the suit property devolved upon all his legal heirs and representatives, namely, one son and seven married daughters in equal share. Thus understood, the Defendant No.1 could not have dealt with 1/3rd share in the suit property as his absolute property.

52. To get over this position, the Defendant No.1 would then contend that after the demise of Nathmal in 1992, all the sisters and brother entered into a family arrangement whereunder all the sisters agreed to give up their right, title and interest in the suit property in favour of the Defendant No.1. In other words, in terms of the family arrangement, the Defendant No.1 became absolute owner to the extent of 1/3 share

in the suit property, originally held by Jankibai. In the first place, there is no document on record to support this plea. It is only word against word. The Defendant No.1 to justify the existence of such family arrangement is relying on negative circumstances-such as none of the co-heirs registered any claim in respect of the suit property since 1992; that all payments regarding outgoings in relation to the suit property was paid by the Defendant No.1; and no expenditure incurred by the sisters. Those circumstances are weak and insignificant circumstances pressed into service. Notably, the theory of family arrangement has also been introduced for the first time in the affidavit dated 25th April, 2007 filed before this Court. No such plea finds place in the pleadings filed in the former suit or any representation or application filed before any authority. This plea is obviously an argument of desperation. For, the Defendants are certain that it is not possible to establish the plea of ouster against the Plaintiff or any other co-heirs. It is only on this basis, claim of the Plaintiff and other co-heirs has been questioned by the Defendant No.1. Significantly, the Defendant No.1 has consciously not taken plea of adverse possession for over 12 years. The escape route found by the Defendant No.1 is,

that of a plea of family arrangement. Notably, this plea is contested not only by the Plaintiff but also the Defendant No.21. The argument of the Defendant No.1 that there are good reasons to accept the theory of family arrangement, which is supported by atleast three sisters, deserves to be stated to be rejected. Merely because three sisters have expressly supported the plea of the Defendant No.1 before this Court on affidavits, that cannot be the basis, in any case at the interim stage, to accept the same, in absence of any contemporaneous record to support such a position. In law, the possession of suit property by one co-heir will be on behalf of all the co-heirs. This contention can be rejected also on the reasoning that, besides the Plaintiff and Defendant No.21, there are other two sisters who have not taken any position in the matter- as they have not chosen to appear before this Court. For the time being, they have simply abstained from the present proceeding, which does not mean that they are supporting the claim of the Defendant No.1. In any case, the plea of family arrangement has been propounded for the first time only in the present proceeding. After 1992 more than one document has been executed by the Defendant No.1. Amongst other, the

Development Agreement, Indemnity Bond and the like. In none of those documents even vague reference has been made about the theory of family arrangement. The fact that the Defendant No.1 has been advised to fall back upon plea of family arrangement is a pointer to the lack of confidence of the Defendant No.1 about the strength of his plea of having inherited the 1/3rd share of Jankibai on account of the Will. Accordingly, this contention is devoid of merits and is obviously an after thought plea taken on behalf of the Defendants out of desperation.

53. On the above findings, it necessarily follows that the suit property in which Jankibai had 1/3 share, after her demise, devolved upon Nathmal. The property was inherited by Nathmal as his separate property. (See The Vijaya College Trust V/s. Kumta Co-operative Arecanut Sales Society Ltd. in AIR 1995 Karnataka 35- para-8; Madanlal Phulchand Jain V/s. State of Maharashtra, AIR 1992 SC 1254-para-2; and M. Shanmugha Udayar V/s. Sivanandam & ors. AIR 1994 Madras 123-para-15). It is nobody's case, nor the plea of Defendant No.1 that the suit property was acquired by Jankibai as

member of a joint family with the aid of ancestral property. Thus understood, after the demise of Jankibai who died intestate, her only heir Nathmal inherited the property as his separate property. The fact that Nathmal died intestate is not in dispute at all. After his demise, naturally the rights possessed and owned by Nathmal in the suit property devolved upon his son and seven married daughters equally. The Plaintiff and Defendant No.21 are two such daughters. The defendant No.1 being the son of Nathmal, though in possession of the suit property, did not have right to transfer or sell the entire 1/3rd share in the suit property. At best he could have committed himself only to the extent of his share in the suit property and not on behalf of other co-heirs of the Nathmal. The Plaintiff has rightly pressed into service exposition of the Apex Court in the case of Shanmughasundaram & Ors. V/s. Diravia Nadar (Dead) by Lrs. & Anr. (2005) 10 S.C.C.728, in particular paragraph 28 and 30 thereof. The Apex Court has observed that absence of partition between co-heirs, the two brothers together had undivided share in the property and they could not have agreed for the sale of the entire property. They were competent to execute agreement to the extent only to their undivided property. It is

further observed that in the event of sale of such undivided share, the vendee would be required to file a suit for partition to work out his right in the property. In paragraph 30, while considering the purport of section 12 of the Specific Relief Act, the Apex Court observed that in the absence of sisters being parties to the agreement, the vendee can at best obtain undivided interest of two brothers in the property. It is further observed that Section 12 of the Specific Relief Act cannot be invoked by the vendee to obtain sale of undivided share of the two brothers with right to force partition on the sisters who were not parties to the agreement of sale. Reliance is also rightly placed on the decision in the case of Bina Murlidhar Hemdev and ors. V/s.Kanhaiyalal Lokram Hemdev and ors. Reported in (1999) 5 SCC 222. In paragraph-39 of this decision, the Court went on to examine the question whether the 8th defendant can be said to be a bonafide purchaser for consideration without notice of the right of Murlidhar's heirs in the Lokram Group. While considering the said contention, the Court observed that the vendor of the builder could not have conveyed more interest than what he had. It is further observed that if the release deed was bad, the vendor could not have conveyed the title of

Murlidhar's branch. For that reason, the plea of a bonafide purchase is, in fact, not available. The Court went on to further observe that the real owners who were third parties to the deed(Murlidhar's heirs) could not be told by the buyer that he was under impression that somebody had purportedly sold their right to him. Reliance is then placed on the decision of the Division Bench of our High Court in the case of Ishrappa Ganappa V/s. Krishna Puttu Shankar Hegde and ors reported in A.I.R.1922 Bombay 413. The Court has held that in situation of this kind, the suit might lie by one stranger against the other for partition for that item of the family property which had been wholly disposed of by the persons who were entitled to it. Reliance is also placed on the decision of Division Bench of Allahabad High Court in the case of Naju Khan V/s. Imtiaz-Ud-Din reported in Vol.XVIII Indian Law Reports page 155 . It is apposite to reproduce the dictum of the Allahabad High Court.

> "The Subordinate Judge was of opinion that, although the land was common land held jointly by the co-sharers, the defendant's new building did not cause any direct loss to the other co-sharers. That is not the point in our opinion. The law provides a legitimate means by which any co-sharer may obtain partition. The law does not favor one co-sharer

> adversely to the other co-sharers making a partition in his own favor, and selecting the portion of the land he likes by erecting a building upon it. This case is within the principle of the decision in Shadi V. Anup Singh(1)."
> (emphasis supplied)

Suffice it to observe that the Consent Terms or the Development agreement, consent decree or the conveyance deed in relation to the "entire 1/3rd share" therein, which was originally held by Jankibai which later devolved upon Nathmal as his separate property, are without authority, as the Defendant No.1 had limited share therein. He was one of the co-heir to succeed to that portion of the suit property alongwith the other co-heirs (married seven sisters) in equal proportion., being legal heirs of Nathmal on the demise of Nathmal who admittedly died intestate.

54. In so far as the plea of Defendant No.2 that the present suit is a collusive suit between the Plaintiff and Defendant No.1 is concerned, even that is devoid of merits. For the nature of controversy on hand it is unfathomable that this suit is a collusive suit between Plaintiff and Defendant No.1. The fact that suit is filed only after the entire

reserved amount was withdrawn by Defendant No.1 may be a coincidence. In any case, the fact that this suit is a collusive suit will have to be established at the trial. For the time being it is not possible to assume that fact only because it is so asserted by the Defendant No.2. Similarly, the plea of Defendant No.2, to resist the claim of the Plaintiff, on the argument that it was a bonafide purchaser, also cannot be countenanced. The Defendant No.2 had knowledge that there were other heirs who might claim right in respect of the suit property. For that reason provision is made in the Agreement that Defendant No.1 would indemnify them from such claim. Moreover, Defendant No.2 was also aware that the Will was not forthcoming nor has been probated. In any case, the Defendant No.2 cannot put forth the plea of bonafide purchaser qua the co-owners who have not agreed to sell the property.

55. There is yet another reason to accept the plea of the Plaintiff that the Plaintiff has invoked the jurisdiction of this Court asserting that the contesting Defendants not only played fraud on the other co-heirs of Nathmal, but also upon this Hon'ble Court. It is therefore, argued that

fraud would vitiate all actions. For that, reliance is placed on the exposition in the case of S.P.Chengalvaraya Naidu(dead) by Lrs. V/s. Jagannath (dead) by Lrs. And ors. Reported in (1994) 1 SCC page 1.

In paragraph-1, the Apex Court observed thus:

> "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree – by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

In Paragraph-5, the Apex Court observed thus:

> "The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often that not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

In paragraph-6, the Apex Court observed thus:

> "Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. ..... A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

Reliance is also placed on the decision in the case of Hamza Haji V/s.State of Kerala & Anr. Reported in (2006) 7 Supreme Court Cases 416. The legal position has been restated in this decision from paragraphs-10 to 14. The Court went on to consider the legal position

on the matter in issue in English and Americal laws. In paragraphs 15 to 24 after referring to the observations of Indian Courts in several Judgments including the case of S.P.Chengalvaraya Naidu(Supra), the Court has found that the Law in India is no different. The same reads thus:

> "10. It is true, as observed by De Grey, C.J., in R.v.*Duchess of Kingston* that:
>
> "`Fraud' is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, esslesiastical and temporal."
>
> 11. In *Kerr on Fraud and Mistake,* it is stated that:
> "In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest court of judicature in the realm, but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud."
>
> 12. It is also clear as indicated in *Kinch v. Walcott* that it would be in the power of a party to a decree vitiated by fraud to apply directly to the court which pronouned it to vacate it. According to Kerr:
>
> "In order to sustain an action to impeach a judgment, actual fraud must be shown; mere constructive fraud is not, at all events after longj delay, sufficient .... but each a

judgment will not be set aside upon mere proof that the judgment was obtained by perjury."

13. In *Corpus Juris Secundum,* Vol 49, para 265, it is acknowledged that:

"Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgments."

In para 269, it is further stated:

"Fraud or collusion in obtaining judgment is a sufficient ground for opening or vacating it, even after the term at which it was rendered, provided the fraud was extrinsic and collateral to the matter tried and not a matter actually or potentially in issue in the action."

It is also stated:

"Fraud practised on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair."

14. In *American Jurisprudence,* 2nd Edn. Vol. 46, para 825, it is stated:

"Indeed, the connection of fraud with a judgment constitutes one of the chief causes for interference by a court of equiry with the operation of a judgment. The power of courts of equity in granting such relief is inherent, and frequent applications for equitable relief against judgments on this ground were made in equiry before the practice of awarding new trials was introduced into the courts of common law.

Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equiry from the judgment. Nor, it has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied."

15. The law in India is not different. Section 44 of the Evidence Act enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a court to consider and decide the question whether a prior adjudication is vitiated by fraud. In *Paranjpe v. Kanade* it was held that :(ILR P.148)

"It is always competent to any court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud;"

16. In *Lakshmi Charan Saha v. Nur Ali* it was held that: (ILR p.936)

"[T]he jurisdiction of the Court in trying a suit [questioning the earlier decision as being vitiated by fraud,] was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree."

17. In *Manindra Nath Mittra v. Hari Mondal* the Court explained the elements to be proved before a plea of a prior decision being vitiated by fraud could be upheld. The Court said:(AIR p.127)

"With respect to the question as to what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words, where the Court has been intentionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence:"

18. The position was reiterated by the same High Court in *Esmile Uddin Biswas v. Shajoran Nessa Bewa.* It was held that: (AIR p.650)

"[I]t must be shown that the fraud was practised in relation to the proceedings in Court and the decree must be shown to have been procured by practising fraud of some sort, upon the Court:"

19. In *Nemchand Tantia v. Kishinchand Chellaram (India) Ltd.* it was held that:(CWN p.740)

"A decree can be reopened by a new action when the court passing it had been misled by fraud, but it cannot be reopened when the court is simply mistaken; when the decree was passed by relying on perjured evidence, it cannot be said that the court was misled."

20. It is not necessary to multiply authorities on this question since the matter has come up for consideration before this Court on earlier occasions. In *S.P.Chengalvaraya Naidu V. Jagannath* this Court stated that:(SCC p.2, para 1)

"It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eye of the law. Such a

judgment/decree- by the first court or by the highest court- has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceeding."

The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to the court with a true case and prove it by true evidence. Their Lordships stated: (SCC p.5, para 5)

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based son falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

21. In *Ram Preeti Yadav v. U.P.Board of High School and Intermediate Education* this Court after quoting the relevant passage from *Lazarus Estates Ltd. v. Beasley* and after referring to *S.P.Chengalvaraya Naidu V. Jagannath* reiterated that fraud avoids all judicial acts. In *State of A.P. V. T. Suryachandra Rao* this Court after referring to the earlier decisions held that suppression of a material document could also amount to a fraud on the Court. It also quoted (at SCC p. 155, para 16) the observations of Lord Denning in *Lazarus Estates Ltd. v. Beasley* that:(All ER p. 345 C)

"No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

22. According to *Story' s Equity Jurisprudence,* 14th Edn., Vol. 1, para 263:

> "Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

23. In *Patch v. Ward* Sir John Rolt, L.J. Held that:

> "Fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and obtaining that decree by that contrivance."

24. This Court in ***B***haurao Dagdu Paralkar v. State of Maharashtra held that : (SCC p.607)

> "Suppression of a material document would also amount to a fraud on the court. Although, negligence is not fraud but it can be evidence on fraud."

In the present case also situation is no different. The material on record not only supports the claim of the Plaintiff of misleading statements made by the Defendant No.1, which is the basis of the Consent Terms and the Consent Decree, but also suppression of material facts. It matters not whether, in fact, the Defendant Nos.2 and 3 colluded with the Defendant No.1 to commit abovesaid fraud.

The Plaintiff has articulated the circumstances in paragraphs-13 to 16 of the Plaint in this behalf which read thus:

> "13. A reading of the Deed of Indemnity dated 20th January, 2004 and the Development Agreement 25th February, 2005 proves that representations (including those set out above) made therein are misleading, contradictory and ex facie false. This is with the mala fide intention of cheating and defrauding the Plaintiff and depriving her to her rights in the said Nathmal's estate, (which includes the said Jankibai's 1/3rd share in the said property) which she is entitled to under the provisions of the Hindu Succession Act, 1946. The fraud is obvious from inter alia the following:
>
> (a) The Development Agreement is signed by Defendant Nos.3 and 4 as partners of Defendant No.2, when in fact they were not so. A copy of the extract of the Registrar of Firms showing the real partners of the Defendant No.2 at the relevant time were and are (Defendants Nos.22 to 26) annexed as Exhibit "R" herein.
>
> (b) In recitals 5(c) to 5(h) of the Development Agreement, it is falsely stated that the said Jankibai made a will and that pursuant to the alleged will, the said Jankibai bequeathed her share in the estate to Defendant No.1. This contradicts the representation in the Deed of Indemnity that the said Jankibai died intestate and that Defendant No.1 claimed title to the said property by reason of being the sole heir and legal representative of the estate of the said Nathmal.
>
> (c) Further, Defendant No.1 falsely alleges that he has filed a Testamentary Petition along with the original of the alleged Will of the said Jankibai in this Hon'ble Court but

that he did not pursue the said petition and that the alleged original will is lying in this Hon'ble Court. The Office of the Prothonotary and Senior Master, High Court, Bombay has confirmed to the Plaintiff that there are no entries in the court register/computer records in the name of the said Jankibai in relation to her alleged will and testament. The only entries in the computer relate to the said suit no.1092 of 1982. A copy of the letter dated 21st February, 2007 issued by the Office of the Prothonotary and Senior Master, High Court, Bombay is annexed as Exhibit “S” hereto.

(d) The statements in the Development Agreement regarding the alleged will of the said Jankibai are also falsified by the registered Deed of Indemnity dated 20th January, 2004 executed by Defendant No.1, in which he states that the said Jankibai and the said Nathmal both died intestate.

(e) To the Plaintiff's knowledge there existed only two tenancies in the said property, namely of Mr. Soli Irani and Mrs. Vidyavati Kyal. However in recital 9 and 11 of the Development Agreement, certain bogus tenancies are created in the name of the Defendants Nos. 7,9 and 10 with a view to reduce the consideration to be shown in the agreement and to under value the transaction. It is pertinent to note that Defendant Nos.7 and 9 were shown as co-owners of the said property in the Written Statement filed by the Defendants in Suit No.1092 of 1981. Therefore the tenancies created by Defendant No.2 are clearly an after though and in view to reduce the value and consideration for the said property.

(f) In clause 6 of the Development Agreement, Defendant No.3 and 4 significantly agreed not to ask the vendors (i) for any Letters of Administration or Probate in respect of the estate of the predecessors in title; and(ii) for any NOC letters/ consent letters/ release letters from the Plaintiff and Defendants Nos.11 to 21. Defendant No.1

further agreed to indemnify Defendants Nos. 3 and 4 in case any claims were received from the sisters of Defendant No.1. In the ordinary course these documents would have been asked for by Defendant No.3 and 4. This establishes beyond any doubt that Defendant Nos. 3 and 4 had notice and cognizance of the right, title and interest of the Plaintiff and were aware that Defendant No.1 was not the only owner of the right, title or interest in the estate of the said Jankibai including the 1/3rd share in the said property.

(g) In clause 7 of the Development Agreement, Defendant No.1 falsely declares that none of the seven daughters of the said Nathmal have any claim in the 1/3rd share in the suit of the said Jankibai estate. In clause 3(a) and 12(i), he further falsely represents that he is the sole owner of the said 1/3rd share in the said property and that he alone is entitled to sell, convey, assign and transfer the said property, receive consideration and give discharge to the Developers in relation to the 1/3rd share of the said Jankibai's branch of co-owners in the said property. This is ex facie false, as admitted by Defendant No.1, both Jankibai and Nathmal Murarka had died intestate.

14. The Plaintiff submits that the consent terms and decree dated 3rd March, 2005 are a nullity, non est, collusive and obtained by perpetuating a fraud on this Hon'ble Court and on the Plaintiff. Further, false statements were made and material facts were suppressed from this Hon'ble Court when the consent decree was applied for and granted. The Consent decree ought to be set aside by this Hon'ble Court is vitiated by fraud and collusion (to defeat the rights of the Plaintiff and the other daughters of the said Nathmal) for the following reasons:

(A) Defendant Nos. 8 and 6 have fraudulently signed the Consent Term dated 25th February, 2005 purporting to be affidavit as defendants No.2 and 3 in the said suit no.1092

of 1981, when they have never been party defendants in the said suit. The following documents on the record of this Hon'ble Court in the said Suit No.1092 of 1981 establish that Defendant Nos. 6 and 8 were not defendants to Suit No.1092 of 1981:

(i) Plaint dated 23rd April, 1981 in Suit No.1092 of 1981, a copy of plaint is annexed as Exhibit “T” hereto;

(ii) Notice of Motion No.1108 of 1981 in Suit No.1092 of 1981 and affidavit in support thereof, alongwith notice of lis pendense filed by the Defendant No.2 herein copies of which are annexed as Exhibit “U and U-1” hereto;

(iii) Written Statement dated 1st December, 1981 filed by the suit Defendants, a copy of which is annexed as Exhibit “V” hereto;

(iv) Notice of Motion No.3579 of 2004 in Suit No.1092 of 1981 and affidavit in support thereof is annexed as Exhibit “W” hereto and

(v) Notice of Motion No.44 of 2005 in suit No.1092 of 1981 and affidavit in support thereof is annexed as Exhibit “X” hereto.

(B) The Plaintiff as one of the legal heirs of the said Nathmal was never added as a party defendant to Suit No.1092 of 1981. By an order dated 7th January, 1993 the Advocates for the defendants to Suit No.1092 of 1981 undertook to furnish the names of heirs of the said Nathmal i.e. Defendant No.2. The plaintiff in Suit No.1092 of 1982 (i.e. Defendant No.2 herein) failed to bring the legal heirs of the said Nathmal i.e., defendant No.2 therein on record in the aforesaid suit. Defendant Nos. 6 to 8 are shown as being defendants to the suit no.1092 of 1981 though they do not appear to have been joined as parties to that suit

and no proceedings for that purpose appear to have been taken in this Hon'ble Court.

(C) Defendants Nos. 3 and 4 made a false statement in the Consent Terms dated 25th February, 2005 by stating that they are partners of Defendant No.2 when in fact they are not so and should have no connection whatsoever with suit No.1092 of 1981. In this regard the following documents are germane:

(i) The extract of the Registrar of Firms (Exhibit “R” hereto) does not show Defendant No. 3 and 4 as the partners of the Defendant No.2.

(ii) A perusal of the documents filed in the High Court in suit no.1092 of 1981 shows that from 1981 till 2005, affidavits have been signed by Mr.Rajendra Khemchand Kothari Defendant No.22 herein in his capacity as a partner of Defendant No.2 and not by Defendants Nos. 3 and 4. Suddenly without any change in the constitution of Defendant No.2 firm, Defendant No.3 and 4 started representing themselves as the partners of Defendant No.2 and began participating in the court proceedings. The following documents on the record of this court show the signature of Mr.Rajendra Khemchand Kothari, Defendant No.22 herein as a partner of Defendant No.2:

(a) Verification clause in the Plaint dated 23rd April, 1981,(Exhibit “T” hereto);

(b) Notice of Motion No.1108 of 1981 in Suit No.1092 of 1981 and affidavit in support thereof, (Exhibit “U” hereto);

(c) Lis pendens Notice signed by Mr. Rajendra Khemchand Kothari in his capacity as the partner of Defendant No.2, a copy of which is annexed as Exhibit “U-1” hereto and

(d) Notice of Motion No.3579 of 2004 in Suit No.1092 of 1981 and affidavit in support thereof, (Exhibit “W” hereto).

(iii) Independently taking a search in the Register of Firms, the Plaintiff has found that the address of Defendant No. 2 is at 522, Commerce house, Nagindas Master Road, Fort, Mumbai -400 023. It is the same as is stated in the cause title of suit no.1092 of 1981 and in all the Notice of Motions until January, 2005. However, Defendants No.3 and 4 in the Development Agreement 25th February, 2005(and subsequently in a Deed of Conveyance dated 31st December, 2005) state that the address of Defendant No.2 at 216, Shah & Nahar Industrial Estate, Dr.E.Moses Road, Worli 400 018.

(D) After the death of the said Nathmal, a party defendant No.2 in Suit No.1092 of 1981, his legal heirs were never brought on record of the suit no.1092 of 1981. On 7th January, 1993 the advocate for the defendants to that suit undertook to inform the plaintiff to that suit of the names of the legal heirs of deceased defendant No.2 to that suit. However, the said legal heirs of deceased were never brought on record in the said Suit. This fact was not disclosed to this Hon'ble Court. Defendant No.1 had no right or authority in law or in fact and could not have transferred any part of the said Jankibai's share in the said property which had devolved upon the said Nathmal. Therefore, the consent decree is vitiated by fraud and must be set aside by this Hon'ble Court and cannot be used to defeat the rights of the Plaintiff.

(E) Defendant No.5 signs the Consent Terms as defendant No.4, while actually he is defendant no.3 all through out the suit proceedings and moreso when order dated 1st December, 1981 has been passed by the Bombay High Court to delete defendant No.4 from the suit

proceedings. A copy of the said order dated 1st December, 1981 is annexed as Exhibit “Y” hereto.

(F) The parties to the said consent terms misled this Hon'ble Court into believing that the suit has been settled by a genuine compromise and agreement between all the necessary parties (including all the heirs of the said Nathmal) including by way of the Development Agreement dated 25th February, 2005, an Irrevocable Power of Attorney dated 25th February, 2005, and the Consent Terms when it was not so. The Deed of Indemnity dated 20th January, 2004 was not disclosed by Defendant No.1 to the Court and the Property Registration Card by Defendant Nos. 3 and 4.

15. The modified Consent Terms dated 24th August, 2005 and the decree dated 17th October, 2005 are vitiated by fraud as stated above and to defeat the rights of the Plaintiff and the other heirs of the said Nathmal, and ought to be recalled and set aside by this Hon'ble Court. Persons who are not parties to the original suit are parties to the modified Consent Terms. It is submitted that modified consent decree is collusive, and vitiated by fraud and misrepresentation. The non-disclosure of the correct parties and insertion of wrong parties in the consent terms also renders the decree null and void. The modified consent terms and modified consent decree constitute fraud on this Hon'ble Court and on the Plaintiff. Material facts have been suppressed and false statements made to obtain the passing of the consent decree. The modified consent decree ought to be set aside by this Hon'ble Court on the aforesaid ground of fraud and collusion (to defeat the rights of the Plaintiff and the other daughters of the said Nathmal) for the following reasons:

(A) The affidavit dated 22nd September, 2005 of Defendant No.3 in support of the Notice of Motion No.2796 of 2005 in Suit No.1092 of 1981 to bring the modified

Consent Terms dated 24th August, 2005 on record is false and misleading.

(B) Defendant Nos. 8 and 6 have signed the modified Consent Terms as defendant Nos. 2 and 3 in the said Suit No.1092 of 1981, when they have never been party defendants in the said suit.

(C) Defendants Nos. 3 and 4 also continue to falsely state that they are partners of Defendant No.2 when in fact they are not so and should have no connection whatsoever with the said suit No.1092 of 1981.

(D) Defendant No.5 has signed the modified Consent Terms as defendant No.4, while actually defendant no.4 has been ordered to be deleted (Exhibit Y hereto) and when he appears as defendant no.3 all through out the suit proceedings.

(E) As in the case of the consent terms dated 25th February, 2005, similar false statements are made by

(i) Defendant No.1 in relation to his rights and title in the said property (clause 8 of the modified consent terms);

(ii) Defendant No.1 in relation to the Plaintiff's right, title and interest in the said property(clause 8 of the modified consent terms); and

(F) As stated above in the context of the consent terms dated 25th February, 2005 bogus tenancies have been created to reduce the consideration amount and value of the transaction.

(G) The factors and informations vitiating the Consent Terms dated 25th February, 2005 and the consent decree

dated 3rd March, 2005 also vitiate, the modified consent terms and modified consent decree.

16. The modified consent decree is also non est and null and void and no rights, title or interest in the said property can be conveyed to Defendants Nos.3 and 4. The said conveyance deed dated 31st December, 2005 (Exhibit N) and rectification deed dated 15th January, 2006 (Exhibit O) thereof are also null and void ab-initio and non est and/or in any event voidable at the instance of the Plaintiff. The Plaintiff has by her Advocate's letter dated 9th April, 2007 avoided inter alia the said consent terms/ the consent decree and deed of conveyance/rectification and the other deeds. The dishonesty of the Defendant Nos.1 to 8 is also reflected in the said Conveyance Deed dated 31st December, 2005 as is evident from the following clauses:

(a) The title clause of the Conveyance Deed records Defendant Nos.3 and 4 as partners of Defendant No.2, when in fact they were not so. A copy of the extract of the Registrar of Firms showing the partners of the Defendant No.2 at the relevant is already annexed as Exhibit “R” hereto.

(b) In the Index-II records, for the Deed, the Permanent Account Number (PAN number) of the Defendant Nos. 3 and 4 is quoted and not that of the Defendant No.2 firm. Defendant No.2 had also not filed Form no.60 of Income Tax Act, 1960.

(c) In the recitals 5(c) to 5(h) of the Deed, Defendant No.1 states that the said Jankibai made a will and pursuant to the alleged will, the said Jankibai bequeathed her share in the said property to Defendant No.1. Further Defendant No.1 alleges that he had filed the Testamentary Petition along with original will of Jankibai in the Bombay High Court but he did not pursue the said petition and that the original alleged will is lying in the High Court. The Plaintiff

has taken search of the records of this Hon'ble Court and the Plaintiff could not found the Petition and alleged will. The Office of the Prothonotary and Senior Master has also confirmed that there are no entries in the court register/computer records in the name of late Jankibai Murarka in relation to her will and testament. A copy of the letter dated 21st February, 2007 issued by the Office of the Prothonotary and Senior Master is already annexed as Exhibit “S” hereto.

(d) Moreover it is contrary to what Defendant No.1 stated in the registered Deed of Indemnity dated 20th January, 2004, viz. That the said Jankibai and the said Nathmal both died intestate.

(e) In recital 5(f) of the Deed, Defendant No.1 states that none of the daughters of the said Nathmal had ever claimed any right, title or interest in the said property.

(f) In recital 9 of the Deed, bogus tenancies have been created by the vendors in the names of their heirs, in order to illegally reduce the purchase consideration.

(g) In recital 13 of the Deed, the defendants in suit No.1092 of 1981 are deliberately and consciously wrongly stated, when the parties to the Deed are aware of the correct position and have stated so from 1981 until 2005. This is only to defraud this Hon'ble Court.

(h) In recital 19 of the Deed, Defendant No.1 falsely represents that he is the owner of the said property in relation to the said Jankibai's estate.

(i) Defendant No.1 falsely declares that he is the sole owner of 1/3rd share in the said property and that he alone is entitled to sell, convey, assign and transfer the said property, receive consideration and give discharge to the Developers in relation to the 1/3rd share of the said

> Jankibai's branch of co-owners. This is ex facie false as admittedly both the said Jankibai and the said Nathmal had died intestate.
>
> (j) Defendant No.1 agrees to keep harmless and indemnify Defendant Nos. 3 and 4 in case any claims were received from persons claiming by or from Defendant No.1. This establishes beyond any doubt that the purchasers had notice of the rights of the Plaintiff and were conscious that the title of Defendant No.1 to the estate of the said Jankibai was not absolute and clear. Nevertheless they proceeded with the conveyance. Defendant Nos. 3 and 4 had also annexed the property registration card (PR card) to the said deed wherein it is clearly mentioned that the said Jankibai had expired intestate and Defendant No.1 is the only legal heir of the said Jankibai. This statement is clearly contrary to the averments made in the deed clause nos. 5(g) and 5(h). Hence it is submitted that the developers had entered into the transaction with prior knowledge and cannot be considered as bona fide purchasers of land."

56. Indeed, attempt of the Defendants was to explain the matters referred to in paragraph 13 in relation to the declaration in the deed of indemnity and development agreement as well as paragraph-14 in relation to the Consent Terms and Decree dated 3rd March, 2005 and paragraph-15 in relation to the modified consent terms dated 24th August, 2005 and the decree dated 17th October, 2005 and paragraph-16 relating to the Conveyance Deed and Rectification Deed. However,

the explanation offered is unacceptable. Repeated acts of omission and commission cannot be passed off as mistake, much less, unintentional error. I have no hesitation in taking the view that the Defendants have played fraud on the Plaintiff and other co-heirs as well as this Hon'ble Court.

57. In so far as the claim of the Defendant Nos.3 and 4, that they had authority to sign Consent Terms and also the related documents clearly overlooks that the Defendant No.3 at any rate was not a partner in Defendant No.2 firm on 24th August, 2005, as he had resigned with effect from 1st June, 2005 in terms of the deed of reconstitution dated 31st March, 2006. The argument that unregistered firm can defend the suit clearly overlooks that in the present case, the Defendant No.2 was the Plaintiff before this Court in the former suit. The suit was filed by a Registered firm. Such suit could have been pursued only by the authorised person on behalf of the firm. If the defendant nos. 3 and 4 were not the partners at the relevant time, they had no authority to execute any documents such as Modified Consent Terms. Any justification given on behalf of the Defendants to overlook this

drawback, is of no avail. On this finding, it necessarily follows that the Consent Terms executed on behalf of the Defendant No.2 firm in the former suit was without authority of law or unlawful. This Court was made to believe that the persons who are signatories to the Consent Terms had authority to execute the same, when in fact to their own knowledge it was not to be. Inevitably, the conclusion is that, it is a case of fraud committed on this Hon'ble Court aswell. If it is a case of fraud on Court, matter will have to be viewed seriously. As is observed by the Apex Court, fraud avoids all judicial acts, ecclesiastical and temporal and that the Judgment or decree passed by the Court on playing fraud on the Court is nullity and non est in the eye of law, which can be challenged in any Courts even in a collateral proceeding. All actions on the basis of such fraud will be nullity and non est. On the above finding, reliance placed by the Counsel for the Defendant No.1 in the case of N.R.Wadia & Co. V/s. The Commissioner of Income Tax, Bombay City I, Bombay(1960 ITR 159 and V. Anjaneya Setty V/s. M/s. M.G.Brothers (AIR 1981 Andhra Pradesh 250) are of no avail.

58. Taking totality of the view, I have no hesitation in accepting the case of the Plaintiff. Ordinarily, granting relief in terms of prayer clause (a), (b) and (c) of the Motion would have served the purpose. However, in the facts of the present case, I think it just and expedient to also grant relief in terms of prayer clause (d) of the Motion. This is so because, I have already recorded finding against the Defendants that the Consent Decree obtained by them is not only by playing fraud on the Plaintiff but also on this Hon'ble Court. In my opinion, the property will have to be preserved during the pendency of the suit. Contesting Defendants cannot be heard to suggest that the Plaintiff has only limited right in the suit property and for the nature of relief that can be granted in the administration suit, her right can be preserved by setting apart certain amount or by furnishing Bank Guarantee to secure her interest. This argument is canvassed relying on the decision in the case of Bina Murlidhar Hemdev(Supra). Counsel for the Defendant No.2 would argue that even if the agreement executed by the Defendant No.1 in respect of the whole 1/3rd share in the suit property, originally held by Jankibai, was not to bind the Plaintiff and other co-heirs, however, as was observed in paragraph-52 of this reported

decision, the Defendant No.2 has come forward to show his bonafides by furnishing bank guarantee. This argument will have to be rejected for more than one reason. In the first place, the observations in paragraph-52 pressed into service are only passing remarks made by the Apex Court and those observations cannot be pressed into service as binding precedent or ratio decidendi. For, the main issue answered by the Apex Court is that the real owners who were third party to the deed could not be told by the buyer that he was under the impression that somebody had purportedly sold their right to him. Such transaction will not bind co-heirs who are not party to the agreement. It is well established position that the co-owner cannot selectively exploit the property on the assumption that he was utilising such portion of the property which would come to his share. Significantly, the Plaintiff is stoutly disputing the valuation of the suit property mentioned in the suit documents. It is the case of the plaintiffs that the same is considerably undervalued. Even in case of co-owner, if he wants to avail of the property, till he gets the property partitioned, the vendee who steps into his shoes, cannot be permitted to develop the property. The Plaintiff has justly pressed into service exposition in the

case of Om Prakash V/s. Chhaju Ram (AIR 1992 Punjab & Haryana 219) (See paras 5,6,7 and 10 thereof).

59. As mentioned earlier, injunction in terms of the prayer clause (a), (b) and (c) would ordinarily be sufficient, but in the present case, there are additional tangible grounds to also accede to the prayer of appointment of Court Receiver. In as much as the Defendant No.2 had argued that it has already created third party rights in the suit property - in the nature of mortgage in favour of the Bank and by selling 28 flats in the proposed building. Once again the stand taken on behalf of the Defendant No.2 of having entered into agreement to sell 28 flats in the proposed building has been countered by the Plaintiffs by relying on information available from the website of the Developers. It mentions that seven exclusive residential flats are proposed to be constructed. Tentative design of the building is also displayed on the website. For the present, suffice it to observe that the claim of the defendant No.2 that it has created third party rights in respect “28 flats” in the proposed building is debatable. There is also substance in the argument of the Plaintiff that the Developers have

created false record by showing the owners as tenants in the suit property. When in fact there were only two tenants in the suit property. It is submitted that all this has been done to gain some advantage of exemptions and benefits provided under the Land Ceiling Act. It is not necessary for me to elaborate on this aspect. Suffice it to observe that the conduct of the developers as well as the Defendant No.1 is questionable. In any case, the suit property cannot be permitted to be exploited unless the issues raised in the present suit are finally answered one way or the other. As mentioned earlier, it is just and expedient that to preserve the suit property. It is therefore, imperative to even accept the Plaintiff's prayer clause (d) of the Motion.

60. The next question is whether the balance of convenience is in favour of the Plaintiff ? I have no difficulty in answering this issue in favour of the Plaintiff. The argument of the Defendant No.2 developers and Defendant No.1 that the Plaintiff has limited right in the suit property or that the developers has already created third party rights in the suit property by selling 28 flats in the proposed building or that creating mortgage in favour of the Bank also does not take the matter

any further for the Defendants. The Defendants have consciously taken the risk of development. The Developer was fully aware about the possibility of other heirs of Nathmal asserting their rights in the suit property. It is only for that reason it is stipulated in the agreement that the Defendant No.1 will indemnify the Developers. It is not a case as if the Developers had no knowledge or were ignorant of rights of the other heirs in the suit property. There is substance in the argument of the Plaintiff that the developers had made all possible efforts to hasten the action by creating mortgage and showing that there are 28 flats in the proposed building and all have been sold, the later claim is, however, questionable. I also find merits in the submission of the Plaintiff that offer made on behalf the developers of furnishing bank guarantee to secure claim of the Plaintiff is in relation to the undervalued consideration shown in the conveyance deed by projecting as if there were 10 tenants in the suit property. It is not necessary for the time being to go into the merits of the argument about the correct value of the suit property. In my opinion, on the finding recorded in the earlier part of the Judgment, that acts of commission and omission of the Defendants were intended to play

fraud on the Plaintiff and other co-heirs as well as on the Court, if that is the finding, the Defendants cannot be heard to contend that the balance of convenience is in their favour.

61. That takes me to the last aspect as to whether the Plaintiff will suffer irreparable loss? As the claim of the Plaintiff is founded on the assertion that the act of commission and omission of the Defendants was founded on fraud on the Plaintiff and other co-heirs as well as on the Court and having accepted that argument, it necessarily follows that all acts founded on such fraudulent conduct will have to be treated as nullity and non est in the eye of law. Besides, once the suit property is exploited, the situation cannot be retrieved for the Plaintiff. Even on this reasoning, the issue of irretrievable loss will have to be answered in favour of the Plaintiff and against the Defendants.

62. In so far as the Chamber Summons of the third party is concerned, as he claims to be one of the tenant in the Suit property and likely to be affected by the outcome of the present proceedings, though may not be a necessary party , for the nature of reliefs claimed

by the Plaintiff, will be a proper party. This is not to say that I am accepting his plea that he was or is the tenant in the suit property. That aspect will have to be addressed on its own merits at the appropriate stage to be decided in accordance with law. For the present the third party Applicant cannot get any other relief except being allowed to be impleaded as a party Defendant to the Suit.

63. Accordingly, for the reasons recorded herein before, I proceed to make the Notice of Motion absolute in terms of prayer clause (A) to (D), which relief will continue till the disposal of the suit. The said prayer clauses read thus:

> A. that pending the hearing and final disposal of the suit, Defendant Nos. 1 to 10 and 22 to 26 by themselves, their servants or agents to be restrained by an order and injunction of this Hon'ble Court from acting pursuant to or in furtherance/ implementation of the documents entered into between the parties including Deed of Indemnity dated

20th January, 2004 (Exhibit "F" to the plaint), Development Agreement dated 25th February, 2005 (Exhibit "H-2" to the plaint), Irrevocable Power of Attorney dated 25th February, 2005 (Exhibit "H-3" to the plaint), Consent Terms dated 25th February, 2005 and decree dated 3rd March, 2005 in terms thereof passed by this Hon'ble Court (Exhibits "H-1" and "I" to the plaint), Consent Terms dated 24th August, 2005 and decree dated 17th October, 2005 in terms thereof passed by this Hon'ble Court, Deed of Transfer of Tenancy dated 30th December, 2005, Deed of Conveyance dated 31st December, 2005 (Exhibit "N" to the plaint) and Deed of Rectification dated 15th January, 2006 (Exhibit "O" to the plaint).

B. that pending the hearing and final disposal of the suit, Defendant Nos. 1 to 10 and 22 to 26 by themselves, their servants or agent to be restrained by an order and injunction of this Hon'ble Court from selling, disposing, alienating, transferring,mortgaging, encumbering

or parting with possession of, dealing with or creating any third party rights whatsoever or holding themselves out to be owners of the properties described in Exhibits "B" and "D-1" to the plaint (including buildings/structures constructed/erected on the said property);

C.? that pending the hearing and final disposal of the suit, Defendant Nos.2 to 4 by themselves, their servants or agents to be restrained by and order and injunction of this Hon'ble Court from carrying on any further construction/development activity and/or applying for any further permissions for the construction/development from the municipal authorities and government authorities in respect of the said property or any part thereof as described in Exhibit "B" and plan marked as Exhibit "D" to the plaint;

D. that pending the hearing and final disposal of the suit, the Court Receiver, High Court, Bombay or any other

person fit and proper be appointed as the Receiver of the properties described in Exhibits "B" and "D-1" to the plaint (including buildings/structures constructed/erected on the said property) with all powers under order XL Rule 1 of the Code of Civil Procedure, 1908;

64. In so far as the Chamber Summons is concerned, the same is also disposed of by making it absolute in terms of prayer clauses (a) and (b). The Plaintiff shall carry out necessary amendment in that behalf.

65. Ordered accordingly.

66. At this stage, Counsel for the Defendant No.2 and 3 prays that operation of this order be stayed. This request is opposed by the Counsel for the Plaintiff. However, as the Defendant Nos. 2 and 3 are inclined to carry the matter in appeal, I think it appropriate that the order directing appointment of Receiver shall not be given effect to for a period of three weeks from today. In so far as construction activity,

which is in progress on the suit property is concerned, the defendant Nos. 2 and 3, if continue the same, that will be entirely at the risk, costs and consequences of the said defendants and no equities can be claimed at a later stage.

(A.M.KHANWILKAR,J)